82-1355

No.....

In The

Supreme Court of the United States

October Term, 1982

CORNELIA DEROIN YELLOWFISH, STELLA DEROIN ROWE, WILLENE DEROIN ROSS, CLARICE DEROIN RICKMAN, WILMA DEROIN GUOLADDLE, PEARL H. DEROIN MCKINNEY, LILLIAN CARSON MORGAN, LENA SHADLOW BLACK, LOUIS (LEWIS) PETERS,

Petitioners,

vs.

CITY OF STILLWATER, OKLAHOMA, AND THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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February, 1983

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QUESTIONS PRESENTED FOR REVIEW

1. Whether 25 U. S. C. § 357 which authorizes the condemnation of Indian trust allotments has been partially displaced by 25 U. S. C. §§ 323-328 which authorizes the Secretary of the Interior and Indian landowners to consent to right-of-ways across trust allotments.

2. Whether the United States, by taking the position in this case that 25 U. S. C. § 357 is not partially displaced by 25 U. S. C. § 323-328, acted outside the scope of its trust duties to the Indian allottees, and breached its trust responsibilities.

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Petitioners Yellowfish, et al. respectfully pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on April 28, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 691 F. 2d 926 (10th Cir. 1982) and

is reproduced as Appendix A, App. 1-36. The order of the Court of Appeals for the Tenth Circuit denying a petition for rehearing and suggestion for rehearing in banc is reproduced as Appendix B, App. 37-38. The opinion of the District Court is unreported and is reproduced as Appendix C, App. 39-43.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on April 28, 1982. A petition for rehearing and suggestion for rehearing in banc was filed on May 7, 1982. The decision of the Court of Appeals denying the petition was entered on November 12, 1982. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

STATUTES INVOLVED

1. 25 U. S. C. § 357, 2d and last paragraph of section 3 of the Indian Appropriations Act of March 3, 1901, 31 Stat. 1058, 1084:

> That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

2. 25 U. S. C. §§ 323-328, the Act of February 5, 1948, §§ 1-6, 62 Stat. 17 (§ 7 of the Act was not codified):

> § 323 (§ 1 of the Act). Rights-of-way for all purposes across any Indian lands
>
> The Secretary of the Interior be, and he is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes,

communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians.

§ 324 (§ 2 of the Act). Same; consent of certain tribes; consent of individual Indians

No grant of a right-of-way over and across any lands belonging to a tribe organized under sections 461-473 and 474-479, of this title; section 473a of this title and sections 358a and 362 of Title 48; and sections 501-509 of this title, shall be made without the consent of the proper tribal officials. Rights-of-way over and across lands of individual Indians may be granted without the consent of the individual Indian owners if (1) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (3) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.

§ 325 (§ 3 of the Act). Same; payment and disposition of compensation

No grant of a right-of-way shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just. The compensation received on behalf of the Indian owners shall

be disposed of under rules and regulations to be prescribed by the Secretary of the Interior.

§ 326 (§ 4 of the Act). Same; laws unaffected

Sections 323-328 of this title shall not in any manner amend or repeal the provisions of the Federal Water Power Act of June 10, 1920 (41 Stat. 1063), as amended by the Act of August 26, 1935 (49 Stat. 838), nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed.

§ 327 (§ 5 of the Act). Same; application for grant by department or agency

Rights-of-way for the use of the United States may be granted under section 323-328 of this title upon application by the department or agency having jurisdiction over the activity for which the right-of-way is to be used.

§ 328 (§ 6 of the Act). Same; rules and regulations

The Secretary of the Interior is authorized to prescribe any necessary regulations for the purpose of administering the provisions of Sections 323-327 of this title.

(§ 7 of the Act).

This Act shall not become operative until thirty days after its approval.

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STATEMENT OF THE CASE

The nine Indian petitioners seek a decision by this Court reversing the decision of the Court of Appeals for the Tenth Circuit and holding that a 1901 statute (25 U. S. C. § 357) vesting federal courts with jurisdiction over actions brought under state law to condemn Indian trust allotments has been partially displaced by a 1948 Act (25 U. S. C. §§ 323-328) authorizing the Secretary of the Interior to grant right-of-ways across trust allotments

subject to whatever conditions he may impose and to the consent of the Indian allottees.[1]

The respondent City of Stillwater, Oklahoma, filed a petition in federal district court to condemn a right-of-way over the trust allotments of the nine Indian petitioners and many other Indians in Noble County, Oklahoma, for the purpose of constructing a municipal water supply pipeline. The United States was joined as a defendant because the allotments sought to be condemned were held in trust pursuant to the General Allotment Act of 1887, 25 U. S. C. § 331 *et seq.*, with the United States retaining legal title as trustee. Federal jurisdiction was predicated on section 3 of the Act of March 3, 1901, 25 U. S. C. § 357.

The Indian petitioners retained private counsel and filed a motion to dismiss for lack of subject matter jurisdiction on the ground that 25 U. S. C. § 357 had been displaced in part by 25 U. S. C. §§ 321-328 and thus right-of-ways over trust allotments could not be condemned under section 357. The United States maintained a neutral position on the motion. The district court issued an interlocutory order denying the motion, and certifying the order for appeal pursuant to 28 U. S. C. § 1292(b). Petitioners filed a petition for permission to appeal, and on July 27, 1981, the Court of Appeals for the Tenth Circuit granted the petition. Both the District Court and the Court of Appeals denied petitioners' motion for a stay of entry and possession pending appeal.

Although maintaining a neutral position in the district court on the issue of the continued applicability of 25 U. S. C. § 357 to right-of-ways, the United States on July 27, 1981 filed a brief in the Court of Appeals taking

[1] 25 U. S. C. § 324 sets out four instances when the Secretary may authorize a right-of-way without Indian consent.

the position that 25 U. S. C. § 357 had not been partially displaced by 25 U. S. C. §§ 323-328. During argument that same day on the petition for leave to appeal, the Court of Appeals questioned the United States attorney concerning the appropriateness of the position assumed by the United States in behalf of the Indian allottees it represented. On August 18, 1981, petitioners filed a motion requesting the Court of Appeals to consider whether the United States was adequately representing its Indian wards and clients in accordance with its trust obligations, and standards of due process. On August 25, 1981 the Court of Appeals ordered the United States to respond to petitioners' motion. On September 16, 1981, the United States served its response stating that its decision to support the continuing validity of 25 U. S. C. § 357 was made in the best interests of the Indian allottees. Attached to the response was a copy of a letter dated September 15, 1981, which was sent to each allottee involved in the case advising them of the litigating position assumed by the United States in the Court of Appeals and advising them of their right to obtain private counsel if they so desired.

The United States ultimately filed two briefs on the merits in this case and argued orally twice asserting the position that 25 U. S. C. § 357 was not partially displaced by 25 U. S. C. §§ 323-328, and thus authorized the condemnation of rights-of-ways across Indian trust allotments. Hence, the two issues addressed by the Court of Appeals were: (1) whether federal court jurisdiction over this condemnation action is lacking because 25 U. S. C. § 357 was partially displaced by 25 U. S. C. §§ 323-328 insofar as the acquisition of right-of-ways is involved, and (2) whether the United States in its capacity as a trustee acted outside the scope of its authority or breached its trust

responsibilities in asserting the position that 25 U. S. C. § 357 was not partially displaced by 25 U. S. C. §§ 323-328.

The Court of Appeals for the Tenth Circuit held that 25 U. S. C. § 357 and 25 U. S. C. §§ 323-328 provide alternative means for a state-authorized condemnor to obtain a right-of-way over Indian allotted lands. The Court also held that in supporting section 357, the United States does not breach its trust to the Indians and is not required to make a showing that its position is in the Indians' best interest.

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REASONS FOR GRANTING THE WRIT

1. This Court's review of the interrelationship between 25 U. S. C. § 357 and 25 U. S. C. §§ 323-328 is warranted to preserve to Indian allottees the full protections afforded them by 25 U. S. C. §§ 323-328, and to bring the federal administration of 25 U. S. C. § 357 and 25 U. S. C. §§ 323-328 into line with current congressional policies.

Several protective provisions of 25 U. S. C. §§ 323-328 would be rendered ineffective if right-of-ways could be obtained by condemnation pursuant to 25 U. S. C. § 357.[2] These provisions include the Secretary's powers to prescribe conditions, to determine just compensation, and to implement the Act through regulations; the allottees' right to withhold consent; and the Secretary's power to grant right-of-ways without the allottees' consent if he finds that the grant will cause no substantial injury to the land or any owner thereof.

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[2]See, e. g., Plains Electric Generation & Transmission Cooperative v. Pueblo of Laguna, 542 F. 2d 1375, 1379-1381 (10th Cir. 1976) ("The protection afforded by [25 U. S. C. §§] 311-328 would be nullified by the continued validity of [an act] which permits condemnation suits at any time for any public purpose without the consent of the Secretary or the Indians." *Id* at 1381.

Likewise, the Secretary's extensive regulations published at 25 C. F. R. Part 169 would be rendered ineffective. Those regulations establish *inter alia*, standards of construction and maintenance for the safety and protection of allottees, 25 C. F. R. § 169.5, a method for esablishing compensation and assessing damages, 25 C. F. R. § 169.13, and the manner of termination of such right-of-ways, 25 C. F. R. § 169.20. Special rules govern certain kinds of right-of-ways and track the requirements of the various special statutes applicable. See, 25 C. F. R. §§ 169.23-169.28.

Furthermore, the Tenth Circuit's decision that section 357 and 25 U. S. C. §§ 323-328 are alternative means of acquiring a right-of-way is inconsistent with the rule that statutes should be construed in a manner that effectuates current congressional policies. See, *Bryan v. Itasca County*, 425 U. S. 373, 386-87 (1976); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U. S. 463, 477-79 (1976).

Section 357 was enacted as the second paragraph of Section 3 of the 1901 Indian Appropriations Act. 31 Stat. 1058, 1084. In 1901, prevailing federal Indian policy was manifested by the General Allotment Act of 1887, 25 U. S. C. § 331 *et seq.* The objectives of the allotment policy "were to end tribal land ownership on the view that private ownership by individual Indians would better advance their assimilation as self-supporting members of our society and relieve the Federal Government of the need to continue supervision of Indian affairs." *Northern Cheyenne Tribe v. Hollowbreast*, 425 U. S. 649, 650 n. 1 (1976). *See also Mattz v. Arnett*, 412 U. S. 481, 496 (1973); and Cohen, *Handbook of Federal Indian Law* 206-210 (1942). Allotted lands were to remain in trust for 25 years, 25 U. S. C. 348, after which "every allottee shall have the bene-

fit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." 25 U. S. C. 349.

When seen in context as part of the entire allotment program, 25 U. S. C. § 357 simply made one group of state laws, those governing condemnation proceedings, applicable to allotted lands several years prior to the expiration of the trust period. Hence, section 357 represents the assimilationist policy of the General Allotment Act era.

It is well-recognized that Congress, in 1934, concluded that the allotment policy had proven disastrous,[3] and repudiated that policy by enacting the Indian Reorganization Act of 1934, 25 U. S. C. § 461 *et seq.* (hereinafter IRA). *See, e. g., Mattz v. Arnett, supra,* at 496 n. 18; *Moe v. Confederated Salish & Kootenai Tribes, supra,* at 478-79; *Mescalero Apache Tribe v. Jones,* 411 U. S. 145, 151 (1973); *Stevens v. C. I. R.,* 452 F. 2d 741, 748 (9th Cir. 1971). Several provisions of the IRA were designed to remedy the loss of Indian lands caused by the allotment policy. *See* 25 U. S. C. §§ 461, 462, 464, 465 and 477. Other provisions of the IRA were designed to afford Indians greater control over the administration of the trust imposed on their lands. *See, e. g.,* 25 U. S. C. § 476 (authorizing tribes to consent to the alienation of their lands or interests therein); *Morton v. Mancari,* 417 U. S. 535, 553 (1974).

25 U. S. C. §§ 323-328 embodies and furthers the policies of the IRA. This is most evident in 25 U. S. C. §§ 323 and 324. Section 323 charges the Secretary with the duty

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[3]Between 1887 and 1934, the allotment process and the sale of so-called "surplus lands" had cut Indian land holdings from 138,000,000 to 48,000,000 acres. See Hearings on H. R. 7902, Committee on Indian Affairs, 73d Cong. 2d Sess. 15-18 (1934).

of imposing protective terms and conditions upon any right-of-way grant. And, section 324 requires the allottees' consent for right-of-ways over allotted lands except in specifically described circumstances when obtaining the consent of all those with interests in the allotment would be impractical or unfair.

Hence, the requirements of 25 U. S. C. §§ 323-328 and the implementing regulations are in keeping with the spirit of the IRA, to control the loss of Indian lands and to "turn over to the Indians a greater control of their own destinies." *Morton v. Mancari, supra,* at 553. Obviously the construction of two statutes in question in this case which effectuates current congressional policies is that which holds that 25 U. S. C. § 357 has been partially displaced by 25 U. S. C. §§ 323-328.

2. Review is appropriate in this case because the issue of the interrelationship between 357 and special right-of-way statutes has long been a troublesome one and has provoked numerous lawsuits in the federal courts, as well as a great deal of inconsistency in administrative interpretation.

The lower federal courts have had several occasions to rule on the issue of whether section 357 has been partially displaced by 25 U. S. C. §§ 323-328 or by other special right-of-way statutes. With one exception, they have construed 25 U. S. C. § 357 and 25 U. S. C. §§ 323-328 as providing alternative means of acquiring right-of-ways over allotments. *See, United States v. Minnesota,* 113 F. 2d 770 (8th Cir. 1940); *Nicodemus v. Washington Water Power Co.,* 264 F. 2d 614 (9th Cir. 1959); *Southern California Edison Co. v. Rice,* 685 F. 2d 354 (9th Cir. 1982); *petition for cert. filed* 51 U. S. L. W. 3443 (U. S. Nov. 24, 1982) (No. 82-873).

The one exception is the recent decision in *Nebraska Public Power District v. 100.95 Acres, etc.,* 540 F. Supp.

592 (D. Neb. 1982), appeal docketed, No. 82-2042-NE (8th Cir., Sept. 3, 1982). In that case, the district court held, *inter alia,* that section 357 is partially displaced by 25 U. S. C. §§ 323-328. That Court reasoned that the protections afforded to Indians by 25 U. S. C. §§ 323-328 would be nullified if condemnation under section 357 were an alternative means of obtaining a right-of-way across Indian allotments. *Id.* at 601-602. The Court distinguished *United States v. Minnesota, supra,* on the grounds that it had been decided before the enactment of 25 U. S. C. §§ 323-328. As noted, the decision is now pending on appeal in the Eighth Circuit.

The Interior and Justice Departments' administration of Section 357 and special rights-of-way statutes has not been consistent. At times, federal officials have taken a position favoring the construction of 25 U. S. C. § 357 and 25 U. S. C. §§ 323-328 or other special right-of-way statutes as alternative means of acquisition. *See, e. g.,* 49 I. D. 396 (1923), *Yellowfish v. City of Stillwater,* 691 F. 2d 926 (10th Cir. 1982). At other times, federal officials have taken a position in favor of the partial displacement of section 357 by sections 323-328, or other special right-of-way statutes. *See, e. g., Minnesota v. United States,* 305 U. S. 382 (1939), especially the United States' Brief in Opposition to Certiorari at 7-8; Brief of the United States at 18-19,[4] and Supplemental Memorandum for the United States at 7

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[4]Solicitor General Robert H. Jackson, argued, *inter alia,* that applying the Section 357 condemnation procedure to highway right-of-ways across allotted lands would render 25 U. S. C. § 311 "self-contradictory" and "largely inoperative." Brief in Opposition to Certiorari, *supra* at 8.

and 8. *Minnesota v. United States, supra. See also, United States v. Clarke,* 445 U. S. 253, 254 n. 1 (1980).[5]

And, following the proceedings in *United States v. Clarke* in this Court, the Solicitor for the Department of Interior determined to maintain a "wait and see" attitude with respect to the issue raised in this case noting the various pending cases raising the issue. *See, e. g.,* Memorandum from the Solicitor for the Department of the Interior to the Assistant Secretary for Land and Water, reproduced as Appendix D, App. 20-23.

This Court has in two previous cases been presented with the issue of the interrelationship between section 357 and a special right-of-way statute. In both cases, however, the Court rested its decision on other grounds and left open the interrelationship issue. *See, Minnesota v. United States,* 305 U. S. 382, 391 (1939), and *United States v. Clarke,* 445 U. S. 253, 254 n. 1 (1980). Petitioners respectfully submit that the Court should now address the issue left open in *Minnesota* and *Clarke,* and finally resolve this longstanding troublesome issue of statutory construction. Review is especially appropriate in view of the widespread applicability of the statutes involved and their importance in the administration of federal trust responsibilities toward Indian allotted lands.

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[5]The allottee Tabbytite was a respondent in *United States v. Clarke;* however, her counsel filed briefs in support of the United States position and also offered as an additional ground for consideration the argument that section 357 does not authorize condemnation of right-of-ways. See Brief for Bertha Mae Tabbytite at 6-7. This argument was not briefed by the Solicitor General. At oral argument, however, when asked whether the United States endorsed the argument of the allottee's counsel, the representative of the Solicitor General's office answered yes. See Reporters Transcript at 14 (January 15, 1980). And see, Appendix D at App. 21-22.

3. The decision of the Tenth Circuit in this case conflicts in principle with that Court's decision in Plains Electric Generation & Transmission Cooperative v. Pueblo of Laguna.

In *Plains Electric Generation & Transmission Cooperative v. Pueblo of Laguna*, 542 F. 2d 1375 (10th Cir. 1976), the State of New Mexico sought to condemn a railroad right-of-way across tribal lands of the Pueblo of Laguna. The State relied upon a 1926 federal statute empowering it to condemn tribal lands of the Pueblos for any public purpose. The Tenth Circuit held that the 1926 Act was superceded by 25 U. S. C. §§ 323-328 because to hold otherwise would result in the nullification of the Secretary's authority under that act to establish conditions to a grant as he deemed appropriate to protect the Indians' interest. The Court also reasoned that condemnation authority would strip the Pueblos of their right under 25 U. S. C. § 324 and the Indian Reorganization Act, 25 U. S. C. § 476, to consent to a right-of-way grant. *See, Plains Electric, supra* at 1380.

Plains Electric established the principle that a statute authorizing condemnation of Indian lands is inconsistent with and must yield to a statute authorizing the Secretary to grant right-of-ways and authorizing the Indians to consent to such grants. Indeed, the Tenth Circuit specifically found that 25 U. S. C. §§ 323-328 impliedly repealed a condemnation statute. *Id.* at 1379-81. However, the Court refused to extend the *Plains Electric* principle to this case solely because the lands involved are trust allotments rather than tribal lands, notwithstanding that under 25 U. S. C. §§ 323-328 the Secretary's authority is the same over both allotments and tribal lands.

The Court's basic error lay in its conclusion that current congressional policy continues to favor subjecting

trust allotments to state jurisdiction and control—a policy embodied in section 357's condemnation process. That this assimilationist policy has been repudiated by the Congress is evidenced by many recent statutes designed to encourage, facilitate and increase tribal control over allotted lands. *See, e. g.,* the Indian Reorganization Act of 1934 (IRA), 48 Stat. 984, 25 U. S. C. §§ 461 *et seq.,* the Indian Country Statute of 1948, 62 Stat. 757, 18 U. S. C. §§1151 and 1152, and most recently the Indian land Consolidation Act, P.L. 97-459, 96 Stat. 2515 (approved January 12, 1983). *And see Mattz v. Arnett,* 412 U. S. C. 481, 496 n. 18 (1973), quoted in *Moe v. Confederated Salish and Kootenai Tribes,* 425 U. S. 463, 478-79 (1976); *see also Mescalero Apache Tribe v. Jones,* 411 U. S. 145, 151 (1973); and Clinton, "Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze," 18 Ariz. L. Rev. 503, 507-13 (1976), reprinted in part in Getches, *Federal Indian Law* 349-52 (1979).

The 1948 Indian Right-of-Way Act, 25 U. S. C. §§ 323-328, embodies and furthers the Indian self-determination policy established by the IRA and reflected in the contemporaneous Indian Country statute of 1948, 18 U. S. C. § 1151(c) that trust allotments, including right-of-ways across them, are intended to be subject to exclusive federal and tribal jurisdiction.

Hence, the grounds upon which the Tenth Circuit attempted to distinguish *Plains Electric* from this case are illusory, and this Court should extend the principles established in *Plains Electric* to this case and hold that section 357 is displaced in part by 25 U. S. C. §§ 323-328.

4. Based upon a misinterpretation of this Court's decision in Andrus v. Glover Construction Co., 446 U. S. 608 (1980), the Tenth Circuit erroneously applied the rule of statutory construction that implied repeals of a statute are not fa-

vored. Glover Construction Co., holds such rule inapplicable where a partial displacement or repeal of a statute is involved. Moreover, the Tenth Circuit's decision totally ignores other rules of statutory construction which should be applied in this case.

In reaching its decision that section 357 was not partially displaced by 25 U. S. C. §§ 323-328, the Tenth Circuit relied heavily upon the " 'cardinal rule' that the repeal of a statute by implication is not favored." *Yellowfish v. City of Stillwater*, 691 F. 2d 926, 928 (10th Cir. 1982). The panel explicitly rejected petitioners' interpretation of this Court's decision in *Andrus v. Glover Construction Co.*, 446 U. S. 608 (1980). The panel said:

> Yellowfish has misconstrued *Glover Construction* and we find no merit in the argument that the partial implied repeal of a statute should be viewed with less disfavor [than the repeal of the entire statute].

Yellowfish at 928 (Appendix A at App. 5).

This Court in *Glover Construction Co., supra* at 618-19, expressly declined to apply the rule disfavoring implied repeals where the issue involved a partial displacement of an earlier act by a later one. In that case, the issue was whether the Buy Indian Act of 1910, 25 U. S. C. § 47, was impliedly repealed in part by the Federal Property and Administrative Services Act of 1949, 41 U. S. C. §§ 251-260 ("the FPASA") such that the authority under the Buy Indian Act to contract with Indians for road construction without first advertising for bids was displaced by the FPASA mandate that certain contracts be advertised. In rejecting the rule that repeal by implication is not favored, the Court said:

> The 1965 amendments to the FPASA did not, however, "repeal" the Buy Indian Act. With the exception of the limited class of contracts enumerated in

subsection (e), the FPASA did not in any manner displace the provisions of the Buy Indian Act.

Glover Construction Co., supra at 618-19.

Under petitioners' argument, 25 U. S. C. § 357 would continue to provide a means by which interests other than right-of-ways could be acquired in allotted lands. Thus since the displacement of section 357 is only partial, the rule that repeals by implication are not favored is inapplicable.

Furthermore, the Tenth Circuit simply ignored other applicable rules of statutory construction in reaching its decision in this case. Those rules urge the holding that 25 U. S. C. § 357 was displaced as to right-of-way acquisition by 25 U. S. C. §§ 323-328.

First, the rule of *expressio unis est exclusio alterius* is applicable because section 4 of the All Purposes Indian Right-of-Way Act of 1948, 25 U. S. C. § 326, expressly saves from repeal a certain class of statutes, i. e., those "empowering the Secretary of the Interior to grant rights-of-way over Indian lands. . . ." Under the foregoing rule, all statutes other than those mentioned are repealed, including 25 U. S. C. § 357, insofar as right-of-ways are involved. *See, e. g., Plains Electric Generation & Transmission Cooperative, Inc. v. Pueblo of Laguna,* 542 F. 2d 1375, 1380 (10th Cir. 1976); *Glover v. Andrus Construction Co., supra* at 616-17; *Tennessee Valley Authority v. Hill,* 437 U. S. 153, 188 (1978); *National Railroad Passengers Corp. v. National Assn. of Railroad Passengers,* 414 U. S. 453, 458 (1974).

Second, the rule that specific statutes control over general statutes should have been applied in this case. See, *MacEvoy v. United States,* 322 U. S. 102, 107 (1944) quoting *D. Ginsberg & Son v. Popkin,* 285 U. S. 204, 208

(1932); and *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). 235 U.S.C. §§ 323-328 is more specific than 25 U.S.C. § 357 since only right-of-ways may be acquired under the former statute, while section 357 on its face is applicable to the acquisition of all kinds of interests in lands including right-of-ways. Hence, effect must be given to the more specific statute - 25 U.S.C. §§ 323-328.

Third, the Court of Appeals ignored the rule that construction of the interrelationship between two statutes must be in favor of co-existence when they are repugnant. *See e.g., Morton v. Mancari, supra* at 55, *Andrus v. Glover Construction Co., supra* at 618-19. Plainly, condemnation under 25 U.S.C. § 357 nullifies the ability of the Secretary of the Interior and the Indians to consent to a public purpose right-of-way across allotments. However, co-existence can be achieved by limiting 25 U.S.C. § 357 to the acquisition of interests in allotted lands other than right-of-ways.

Fourth, this Court has said that when the purpose of federal restrictions on Indian land is to give needed protection, "they should be construed in keeping with that purpose." *Smith v. McCullough*, 270 U.S. 456, 464-65 (1926); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 666 (1979). Condemnation of right-of-ways under section 357 strips the Secretary and the Indians of their authority and rights under 25 U.S.C. §§ 323-328. The foregoing rule of construction thus supports a determination that section 357 has been partially displaced by 25 U.S.C. §§-323-328 for only that construction will afford Indians the protections of 25 U.S.C. §§ 323-328 to the fullest extent possible.

5. The United States cannot advocate for the condemnation of Indian trust allotments and simultaneously act as the Indians' trustee. Therefore, the position asserted in this case by federal officials is beyond their authority and constitutes a breach of the United States' trust responsibilities.

While this case was pending on appeal in the Tenth Circuit, attorneys for the United States asserted for the first time in the case the position that 25 U. S. C. § 357 authorizes condemnation of trust allotments notwithstanding the enactment of 25 U. S. C. §§ 323-328.[6] Consequently, petitioners Yellowfish *et al.*, filed a motion with the Court of Appeals requesting that Court to consider the adequacy of the United States' representation of its Indian beneficiaries. The Court of Appeals concluded that the United States' position was justified. The Court said:

> when the United States merely supports and carries out the clear intent of congressional policy as manifested in section 357, it does not breach its trust and it is not required to make a showing that its position is in the Indians' best interest.

Yellowfish v. City of Stillwater, 691 F. 2d 926, 931 (10th Cir. 1982) (Appendix A at App. 11).

The Court of Appeals failed to comprehend the statutory basis of the United States' authority and duty as trustee in this case. In particular, the Court of Appeals erred in relying upon 25 U. S. C. § 357 as authority for the United States' action in this case.

The authority of federal officials to act in behalf of the United States as trustee for American Indians is derived from federal statutes creating trust duties in such

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[6]See Memorandum of United States in Opposition to the Petition and to Reversal (filed July 27, 1981) and Brief for the United States, Appellee, (filed September 30, 1982), *Yellowfish v. City of Stillwater*, 691 F. 2d 926 (10th Cir. 1982).

officials and the scope of that authority is ascertained from the legislative intent and, in the absence of any express indications, from equitable principles of trust. *See, e. g., United States v. Mitchell*, 445 U. S. 535 (1980); *Seminole Nation v. United States*, 316 U. S. 286, 297 (1942); and II A. Scott, *The Law on Trusts* § 164 (3d ed. 1967).

25 U. S. C. § 357 does not create any trust relationship between federal officials and Indians. No trust responsibilities are imposed by that statute on federal officials. Indeed, that statute operates in this case to nullify the ability of federal officials to carry out their trust duties under both the General Allotment Act and 25 U. S. C. §§ 323-328.[7]

In *Minnesota v. United States*, 305 U. S. 382 (1939) this Court held that the United States is an indispensible party in proceedings under section 357 to condemn trust allotments. However, the interest of the United States in such proceedings is not in implementing the condemnation of Indian lands, but in ensuring during the pendency of such proceedings that the restraints imposed on such lands by other federal statutes are enforced. *Id.* at 387-88.

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[7]The allotted lands involved in this case are held in trust pursuant to the General Allotment Act of 1887, 25 U. S. C. § 331 *et seq.* See *Yellowfish, supra* at 927 (Appendix A at App. 1). The General Allotment Act created a limited trust relationship between federal officials and Indians. It empowers federal officials to hold the land in trust for the purposes of preventing alienation of the land and ensuring immunity of the land from state taxation. *United States v. Mitchell, supra* at 544. Subsequently, the enactment of 25 U. S. C. §§ 323-328 created trust duties on the part of the Secretary of the Interior by authorizing him to grant right-of-ways across allotments subject to conditions imposed by the Act and by the Secretary's regulations, 25 C. F. R. Part 169. *See, Mitchell v. United States*, 664 F. 2d 265, 269 (Ct. Cl. 1981), petition for cert. granted 73 L. Ed. 2d 1312 (U. S. June 7, 1982) (No. 81-1748).

Obviously, section 357 is the antithesis of a statute imposing restraints upon the alienation of allotted land, and therefore the antithesis of a statute creating a trust relationship. This Court has recently acknowledged the inherent antagonism between the power to condemn and the duties of a trustee. In *United States v. Sioux Nation of Indians*, 448 U. S. 371, 408 (1980), this Court held that the power of condemnation is the tool of a sovereign, not the tool of a trustee. Consequently, in its dealing with Indian lands, the United States cannot exercise its sovereign power of eminent domain over Indian lands and simultaneously act as a trustee for the Indians.

Accordingly, the position taken in this case by federal officials acting in behalf of the United States as trustee for the Indians is not authorized by 25 U. S. C. § 357 and in fact operates ultimately to defeat trust duties imposed by other federal statutes.[8] In essence, the United States in its capacity as trustee for the Indians was not represented in this case.

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[8]Federal officials in this case also asserted in justification of their legal position that the position was in the best interests of the Indians. The Court of Appeals found that generally right-of-way condemnation is in the Indians' best interests. *See, Yellowfish* at 931 (Appendix A at App. 11-12). However, the common law rule of trusts that the trustee must administer the trust solely in the interest of the beneficiaries is misapplied by the Court of Appeals. That rule is applicable only when the trustee is authorized by the terms of the trust to take action. It is a guide to determine the parameters of the trustee's authority under the terms of the trust. It cannot, however, be relied upon to create a trust relationship between the United States and Indians. Such a relationship must be statutorily based. In this case, the United States does not have authority to condemn under section 357. Indeed, as discussed above, section 357 does not establish a trust relationship at all. Since section 357 does not confer any trust duties on the United States, the "best interests" rule is simply inapplicable to justify the legal position taken by the United States purportedly as the Indians' trustee.

Moreover, the legal position taken by the federal officials involved in this case constituted a breach of trust because the principles of trust applicable to this case required the United States to resist Stillwater's claim to condemnation authority over the Indians' lands, and to support the Indian petitioners' defense.

Under the General Allotment Act, 25 U. S. C. § 331 et seq., and 25 U. S. C. §§ 323-328, federal officials have the duty to prevent alienation of trust allotments without the consent of the United States or the Indians. Furthermore, as a trustee charged with the preservation of trust allotments, the United States is charged under common law principles of trust with the duty to resist claims against the trust estate, when it is reasonable to do so under the circumstances. See, II A. Scott, *The Law on Trusts* § 178 (3d ed. 1967), *Restatement (Second) of Trusts*, § 178 at 385 (1959).

In this case, the state of the law in the Tenth Circuit's jurisdiction as to the issue of whether section 357 was partially repealed by 25 U. S. C. §§ 323-328 was unsettled for two reasons. First, the Tenth Circuit had not yet ruled on the interrelationship between those two statutes. Second, and most significantly, in *Plains Electric Generation & Transmission Cooperative v. Pueblo of Laguna*, 542 F. 2d 1375 (10th Cir. 1976), the Tenth Circuit held that 25 U. S. C. §§ 323-328 superceded a condemnation statute applicable to tribal trust lands. It would have been eminently reasonable for the United States, in reliance on the *Plains Electric* decision, to resist the claim of Stillwater that it is authorized under section 357 to

condemn a right-of-way over trust allotments.[9] Since the United States did not resist Stillwater's claim and instead asserted a legal position in support of Stillwater's condemnation authority, the United States committed a gross breach of its trust responsibilities to the Indians in this case.[10]

Since the officials representing the United States as trustee for the Indian allottees in this case acted outside the scope of their authority and failed to act in accordance with their trust duty, the United States was in effect absent as a party trustee in this case. Therefore this action should be dismissed for lack of an indispensible party. *Minnesota v. United States, supra.*

CONCLUSION

For the reasons stated, the Court is respectfully requested to grant a writ of certiorari.

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[9]The impact of the *Plains Electric* decision upon the jurisdictional issue in this case is reflected in the fact that the district court certified its interlocutory decision on the issue for immediate appeal pursuant to 28 U. S. C. 1292(b), see Appendix C at App. 18, and in the fact that the Court of Appeals accepted the case for review.

[10]If the United States wished to take a legal position in favor of condemnation of trust allotments for right-of-ways, it should not have done so under the guise of the Indians' trustee. Rather, it should have participated in another capacity, perhaps as an amicus or as an intervenor depending upon the nature and importance of the interest it might be able to demonstrate. Any resulting conflict of interest problem could then have been directly addressed and resolved.

Respectfully submitted,

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NATIVE AMERICAN RIGHTS FUND

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February, 1983

APPENDIX A

Opinion of the Court of Appeals

Cornelia DeRoin YELLOWFISH, Stella DeRoin, Willene DeRoin, Clarice DeRoin Rickman, Wilma DeRoin Guoladdle, Pearl H. DeRoin McKinney, Lillian Carson Morgan, Lena Shadlow Black, Louis (Lewis) Peters,

Plaintiffs-Appellants,

vs.

CITY OF STILLWATER,

Defendant-Appellee.

No. 81-1948

United States Court of Appeals, Tenth Circuit

April 28, 1982

Rehearing Denied Nov. 12, 1982

Before HOLLOWAY, DOYLE and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

The City of Stillwater filed a petition in federal district court to condemn easements over the trust allotments of the nine Indian appellants (hereinafter collectively referred to as "Yellowfish") and other Indians in Noble County, Oklahoma, for the purpose of constructing a municipal water supply pipeline. The United States was joined as a defendant because the allotments under condemnation were originally issued under the General Allotment Act of 1887, 25 U. S. C. § 331 *et seq.*, with legal title to the land retained by the United States as trustee.

Jurisdiction is predicated on section 3 of the Act of March 3, 1901, 25 U. S. C. § 357 (section 357), which pro-

vides that "[l]ands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned. . . ." Yellowfish contends that section 357 was impliedly repealed in part by the Act of February 5, 1948, 25 U. S. C. §§ 323-328 (1948 Act),[1] which empowers the Secretary of the Interior to

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1. The 1948 Act provides in pertinent part:

"The Secretary of the Interior be, and he is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians."

25 U. S. C. § 323

"No grant of a right-of-way over and across any lands belonging to a tribe organized [certain] sections . . . of this title . . . shall be made without the consent of the proper tribal officials. Rights-of-way over and across lands of individual Indians may be granted without the consent of the individual Indian owners if (1) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (3) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent and also finds that the grant will cause no substantial injury to the land or any owner thereof."

25 U. S. C. § 324.

(Continued on next page)

grant rights-of-way with the consent of Indian allottees.[2] If this were so, the district court would not have subject matter jurisdiction under section 357 to proceed with the proposed condemnation in this case. However, we disagree with Yellowfish and affirm the trial court holding that federal courts have jurisdiction under section 357 to condemn rights-of-way over allotted Indian land without secretarial or Indian consent.

I.

Background

After the condemnation petition was filed, the Bureau of Indian Affairs sent letters to each of the 110 allottee defendants informing them they could have the United States Attorney represent them in the condemnation action. The nine Indian appellants decided instead to retain private counsel. The trial court concluded that section 357 was not repealed by implication and refused to dismiss the case or stay ongoing proceedings. The court also refused to prohibit the City of Stillwater from taking

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(Continued from previous page)

> "No grant of a right-of-way shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just. The compensation received on behalf of the Indian owners shall be disposed of under rules and regulations to be prescribed by the Secretary of the Interior."

25 U. S. C. § 325.

2. Under certain limited circumstances, the Secretary may authorize a right-of-way without Indian consent. *See* 25 U. S. C. § 323 [sic] *supra* n. 1.

possession of the condemned allotments in order to construct the water pipeline.

Yellowfish filed a petition for permission to take an interlocutory appeal from the trial court's order and a motion for a stay pending appeal. We granted permission for the interlocutory appeal but denied the stay pending appeal. The two issues on appeal are (1) whether federal court jurisdiction is absent because condemnation of rights-of-way under section 357 was impliedly repealed by the 1948 Act, and (2) whether the United States in its capacity as a trustee is required to disclose more specifically its grounds for asserting that right-of-way condemnations are in the best interest of Indians.

II.

Federal Court Jurisdiction and Implied Repeal of Section 357

It is a "cardinal rule" that the repeal of a statute by implication is not favored. *Morton v. Mancari,* 417 U. S. 535, 549, 94 S. Ct. 2474, 2482, 41 L. Ed. 2d 290 (1974); *Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Commission,* 393 U. S. 186, 193, 89 S. Ct. 354, 358, 21 L. Ed. 2d 334 (1968). The implied repeal of a statute of longstanding use may be viewed with even greater disfavor. *See Mancari,* 417 U. S. at 549, 94 S. Ct. at 2482. "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Andrus v. Glover Construction Co.,* 446 U. S. 608, 618-19,

100 S. Ct. 1905, 1911, 64 L. Ed. 2d 548 (1980) (quoting *Mancari*, 417 U. S. at 551, 94 S. Ct. at 2483). *See Steed v. Roundy*, 342 F. 2d 159, 161 (10th Cir. 1965).

Based on its interpretation of *Glover Construction*, 446 U. S. at 618-19, 100 S. Ct. at 1911, Yellowfish contends that when a partial repeal is advocated the rule that implied repeals are not favored does not apply. Yellowfish has misconstrued *Glover Construction* and we find no merit in the argument that the partial implied repeal of a statute should be viewed with less disfavor. We also reject Yellowfish's contention that the presumption against implied repeal is not applicable when various Indian statutes are involved. *See Plains Electric Generation & Transmission Cooperative v. Pueblo of Laguna*, 542 F. 2d 1375, 1376-1381 (10th Cir. 1976).

There are two well accepted categories of repeal by implication: "'(1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act.'" *Plains Electric*, 542 F. 2d at 1376 (quoting *Posadas v. National City Bank*, 296 U. S. 497, 503, 56 S. Ct. 349, 352, 80 L. Ed. 351 (1936)). In either situation, legislative history and congressional intent are important factors. *Plains Electric*, 542 F. 2d at 1376, but the intent of the legislature must be "clear and manifest" to uphold an implied repeal. *Posadas*, 296 U. S. at 503, 56 S. Ct. at 352.

Yellowfish contends our reasoning in *Plains Electric* dictates that we should hold section 357 partially repealed

by implication. In that case, we held condemnation under a 1926 Act[3] impermissible because that Act was replaced and impliedly repealed by a 1928 Act[4] and by the 1948 Act, both of which require the Secretary's consent to right-of-way grants. Yellowfish asserts that section 357 is "strikingly similar in effect" to the 1926 Act and therefore was impliedly repealed as well.

Although the 1926 Act and section 357 have similarities, the important difference is that section 357 authorizes condemnation of *allotted* land, while the 1926 Act allowed condemnation of lands *communal'y owned* by the Pueblo Indians.[5] *See Plains Electric,* 542 F. 2d at 1377. The different treatment accorded by Congress to Indian tribal land and land allotted in severalty to individual Indians has been explained by several courts. *See United States v. Oklahoma Gas & Electric Co.,* 318 U. S. 206, 211-215, 63 S. Ct. 534, 536-38, 87 L. Ed. 716 (1943); *United States v. 10.69 Acres of Land,* 425 F. 2d 317, 319 (9th Cir. 1970); *United States v. Oklahoma Gas & Electric Co.,* 127 F. 2d 349, 353-54 (10th Cir. 1942); *aff'd,* 318 U. S. 206, 63 S. Ct. 534, 87 L. Ed. 716 (1943). While *Plains Electric* supports the proposition that Congress distinguished between tribal and allotted lands and did not intend to permit condemnation of *tribal* or communally owned land, it

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3. Act of May 10, 1926, 44 Stat. 498 (1926 Act).

4. Act of April 2, 1928, 25 U. S. C. 322 (1928 Act).

5. Moreover, the 1928 Act's legislative history indicates that Congress intended it to repeal and substitute for the 1926 statute authorizing condemnation. *Plains Electric,* 542 F. 2d at 1377-79. We have found no legislative history for the 1948 Act suggesting a similar congressional intent.

is silent on the subject of allotted lands. Consequently, that case does not compel the conclusion that Congress also partially repealed section 357 by implication.

Three circuits have recognized that section 357 provides an alternative method for acquiring allotted Indian land. In *United States v. Minnesota,* 113 F. 2d 770 (8th Cir. 1940), the Eighth Circuit held that condemnation under section 357, section 3 of the 1901 Act, was not modified by the requirement of secretarial consent for rights-of-way under 25 U. S. C. § 311, section 4 of the 1901 Act. In giving each provision in the statute full effect, the Eighth Circuit explained why Congress could reasonably intend both the consent of the Secretary and the condemnation power without consent to apply to allotted land as alternative methods of right-of-way acquisition:

> "The land involved, being allotted in severalty, is no longer a part of the reservation, nor is it tribal land. The virtual fee is in the allottee, with certain restrictions on the right of alienation. This restriction, consistent with the Government's paternal policy toward the Indians, was doubtless to protect the Indian from being overreached in the sale of his land. The statutes seem definitely to offer two methods of procedure for the acquisition of a right of way for public highway. Section 3, 25 U. S. C. A. § 357, authorizes the maintenance of condemnation proceedings. Ordinarily, the owner of a fee title to real estate may grant a right of way over his land, but although the allottee is vested with fee title, his right of alienation is restricted, and hence, it would not be possible to secure a right of way from such allottee by purchase, however desirable it might be, and however advantageous to the allottee. By Section 4 of the Act, 25 U. S. C. A. § 311, the Secretary of the Interior is authorized to grant permission for the opening and establishment of a public highway through lands al-

> lotted in severalty. Thus, it was made possible to acquire such a right of way by either of two methods, the Government having consented to each of these methods. So considered, each of these sections is an effective and reasonable provision in the procedure for the acquisition of a right of way, neither dependent upon the other."

113 F. 2d at 773.

This court has similarly rejected the implied repeal argument. In *Transok Pipeline Co. v. Darks*, 565 F. 2d 1150, 1153 (10th Cir. 1977), *cert. denied*, 435 U. S. 1006, 98 S. Ct. 1876, 56 L. Ed. 2d 388 (1978), we noted that although the Secretary's approval was required for rights-of way under 25 U. S. C. § 323 (the 1948 Act) and various other provisions, his approval was not necessary for condemnation under section 357. *Accord, Nicodemus v. Washington Power Co.*, 264 F. 2d 614, 617-18 (9th Cir. 1959). We explained that "[u]ndoubtedly Congress considered the safeguards available in federal judicial proceedings to be sufficient so that the permission of the Secretary was not required." 545 F. 2d 1153. We disagree with Yellowfish's contention that *Minnesota, Nicodemus*, and *Transok Pipeline*[6] were wrongly decided.

Yellowfish also argues that condemnation of rights-of-way under section 357 conflicts with current congres-

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6. We note that a decision of this court may not be overturned by a panel of three judges but must instead be considered by the court en banc. However, this poses no problem in the present case because we agree with the conclusion in *Transok Pipeline* that condemnation of allotted lands may proceed under section 357 without the Secretary's consent.

sional policy embodied in other statutes. In the Indian Reorganization Act of 1934, 25 U. S. C. §§ 461 *et seq.* (IRA), and the Oklahoma Indian Welfare Act of 1936, 25 U. S. C. §§ 501 *et seq.* (OIWA), Congress substantially changed prior Indian policy. For example, section 1 of the IRA, *id.* § 461, prohibited further allotment of any Indian reservation land. Nevertheless, existing allotments were continued and remain in effect. Moreover, allotments are still made to Indians not residing on reservations. *See* 25 U. S. C. § 334.

Federal policy toward Indians is often contained in several general laws, special acts, treaties, and executive orders, and these must be construed *in pari materia* in ascertaining congressional intent. *See Stevens v. Commissioner,* 452 F. 2d 741, 744, 745 n. 8 (9th Cir. 1971). "And, although the 'rule by which legal ambiguities are resolved to the benefit of the Indians' is to be given 'the broadest possible scope,' '[a] canon of construction is not a license to disregard clear expressions of . . . congressional intent.' ". *Glover Construction,* 446 U. S. at 619, 100 S. Ct. at 1911 (quoting *De Coteau v. District County Court,* 420 U. S. 425, 447, 95 S. Ct. 1082, 1094, 43 L. Ed. 2d 300 (1975)). The test is the intent of Congress, not whether the statute is general or special.

We find it persuasive that in 1976 Congress still viewed section 357 as a valid condemnation statute. In that year it passed a statute that repealed the 1926 Act at issue in *Plains Electric.* Act of September 17, 1976, 90 Stat. 1275 (1976 Act). At the same time, the 1976 Act amended the 1928 Act *to extend section 357* to the Pueblo Indians of New Mexico and their lands. 90 Stat. 1275.

In *Oklahoma Gas & Electric*, 318 U. S. 206, 63 S. Ct. 534, 87 L. Ed. 716, the Supreme Court considered whether secretarial permission granted to a state under 25 U. S. C. § 311 to build a highway over allotted Indian land included the right of the state to permit the construction of a rural electric line along the highway. In concluding that it did, the Court said:

> "Oklahoma is spotted with restricted lands held in trust for Indian allottees. Complications and confusion would follow from applying to highways crossing or abutting such lands rules differing from those which obtain as to lands of non-Indians. *We believe that if Congress had intended this it would have made its meaning clear.*"

Id. at 211, 63 S. Ct. at 536 (emphasis added). This reasoning applies equally well to the present situation where condemnation of rights-of-way on allotted land interspersed with non-Indian land is needed to effectively carry out public purposes such as construction of water pipelines.

We conclude that the intent of Congress to partially repeal section 357 by implication is not "clear and manifest," and that the two statutes are not in irreconcilable conflict. In fact, section 357 and the 1948 Act can be harmonized. The two statutes provide alternative methods for a state-authorized condemnor to obtain a right-of-way over *allotted* lands. The potential condemnor may proceed under section 357 to condemn the right-of-way, or he may apply to the Secretary of the Interior for permission to purchase the right-of-way under the 1948 Act, if the allottees' consent is obtained.

The long history of condemnation of rights-of-way over allotted lands without Secretarial consent, the various cases upholding the practice, and the disfavor with

which courts view repeal by implication support this conclusion. We have considered Yellowfish's other arguments that section 357 has been partially repealed and find them to be without merit. Accordingly, the trial court has jurisdiction under section 357 over Stillwater's condemnation of the water pipeline.

III.

United States as Fiduciary

Yellowfish questions whether the legal position assumed by the United States in support of Stillwater's power to condemn trust allotments is a reasonable and permissible exercise of judgment consistent with its duties as trustee to the Indians. Yellowfish argues that the United States should be required to disclose more specifically the grounds for its position that condemnation of rights-of-way is in the best interest of its Indian beneficiaries. Under the facts of this case, we disagree. When the United States merely supports and carries out the clear intent of congressional policy as manifested in section 357, it does not breach its trust and it is not required to make a showing that its position is in the Indians' best interest. *See Nicodemus,* 264 F. 2d at 618. As we previously stated, Congress has already weighed the Indians' interest and "[u]ndoubtedly Congress considered the safeguards available in federal judicial proceedings [under section 357] to be sufficient." *Transok Pipeline,* 565 F. 2d at 1153.

Even if the Government needed to demonstrate why right-of-way condemnations are in the best interest of Indians, we are persuaded that the Government adequately

made such a showing in oral argument. If condemnation is not permitted, a single allottee could prevent the grant of a right-of-way over allotted lands for necessary roads or water and power lines. Moreover, Indian allottees benefit as much from public projects as do those non-Indian property owners whose land is interspersed with the allottees' land.

AFFIRMED.

APPENDIX B

Order of the Court of Appeals Denying the Petition for Rehearing and the Suggestion for Rehearing In Banc

SEPTEMBER TERM — November 12, 1982

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges.

No. 81-1948

CORNELIA DeROIN YELLOWFISH, STELLA DeROIN ROWE, WILLENE DeROIN ROSS, CLARICE DeROIN RICKMAN, WILMA DeROIN GUOLADDLE, PEARL H. DeROIN McKINNEY, LILLIAN CARSON MORGAN, LENA SHADLOW BLACK, LOUIS (LEWIS) PETERS,

Petitioners,

vs.

THE CITY OF STILLWATER,

Respondent.

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing in banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service

on the Court having requested that the Court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Howard K. Phillips, Clerk

By /s/ Robert L. Hoecker
Chief Deputy Clerk

APPENDIX C

Opinion and Order of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-81-674-D

THE CITY OF STILLWATER, OKLAHOMA,
A Municipal Corporation,
Plaintiff,

vs.

AN EASEMENT AND RIGHT-OF-WAY FOR WATER PIPELINE PURPOSES ACROSS VARIOUS TRACTS OF LAND IN NOBLE COUNTY, OKLAHOMA AS INDICATED, et al.,
Defendants.

(Filed July 8, 1981)

O R D E R

This is a condemnation action brought by Plaintiff to obtain easements and rights-of-way in various tracts of land located in Noble County, Oklahoma, for use in connection with a municipal water supply pipeline running from Kaw Reservoir in Osage County, Oklahoma, to Stillwater, Oklahoma. Presently before the Court in this matter is a Motion to Dismiss for Lack of Subject Matter Jurisdiction and a Motion entitled "Motion to Postpone Appointment of Commissioners, or in the Alternative to Prohibit Plaintiff from Entering into Possession, Pending Final Resolution of Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction" filed by Defendants Pearl H. DeRoin McKinney, Lillian Carson Morgan, Lena Shadlow Black, Stella DeRoin Rowe, Willene DeRoin Ross,

Clarice DeRoin Rickman, Wilma DeRoin Guoladdle, Cornelia DeRoin Yellowfish and Louis (Lewis) Peters (hereinafter referred to collectively as "Movants"), all of whom are Indian allottees. On June 30, 1981, the Court conducted a hearing on Movants' Motion to Dismiss at the conclusion of which the Court orally overruled said Motion and indicated that the instant Order would be entered formally setting out the Court's ruling.

In their Motion to Dismiss, Movants contend that this action should be dismissed for lack of subject matter jurisdiction on the grounds that the second paragraph of § 3 of the Act of March 3, 1901, ch. 832, § 3, 31 Stat. 1084 (codified at 25 U. S. C. § 357) has been partially repealed by implication by the Act of February 5, 1948, ch. 45, §§ 1-6, 62 Stat. 17-18 (codified at 25 U. S. C. §§ 323-328), and therefore does not empower the Plaintiff to *condemn* a water pipeline right-of-way across Movants' allotments.

25 U. S. C. § 357 provides as follows:

> "Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."

Turning to the Act of February 5, 1948, *supra* (hereinafter "1948 Act"), 25 U. S. C. § 323 empowers the Secretary of the Interior to *grant* rights-of-way for all purposes, subject to such conditions as he may impose, across any Indian lands held in trust. 25 U. S. C. § 324 requires "the consent of the proper tribal officials" before a right-of-way may be *granted* over and across any lands belonging to Indian tribes organized under certain statutes. § 324

provides with regard to trust lands allotted to individuals as follows:

> Rights-of-way over and across lands of individual Indians may be *granted* without the consent of the individual owners if (1) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the *grant;* (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the *grant;* (3) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the *grant* will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the *grant* will cause no substantial injury to the land or any owner thereof. (Emphasis added.)

25 U. S. C. § 325 requires that no *grant* of a right-of-way be made without "the payment of such compensation as the Secretary of the Interior shall determine to be just." 25 U. S. C. § 326 provides that nothing in the 1948 Act shall "amend or repeal" the Federal Water Power Act "nor shall any existing statutory authority empowering the Secretary of the Interior to *grant* rights-of-way over Indian lands be repealed." 25 U. S. C. § 327 authorizes the *grant* of rights-of-way under the provisions of the 1948 Act for the use of the United States upon application by the federal department or agency having jurisdiction over the activity for which the right-of-way is to be used. 25 U. S. C. § 328 empowers the Secretary of the Interior to prescribe any necessary regulations for the purpose of implementing the 1948 Act.

In view of the foregoing, it is apparent that Movants' contention that the 1948 Act repealed 25 U. S. C. § 357 by implication insofar as § 357 applies to the acquisition of rights-of-way across Indian allotments is without merit. Rather, § 357 and the 1948 Act clearly serve different purposes and provide separate and independent means for obtaining rights-of-way across Indian lands. In this connection, the express language of § 357 indicates that said section applies in a *condemnation* situation while the provisions of the 1948 Act apply only to *grants* of rights-of-way in Indian lands. Thus, approval of the Secretary of Interior or the affected Indian tribe or individual Indian land owners is not required as a prerequisite to condemnation under § 357. See *Transok Pipeline Co. v. Darks,* 565 F. 2d 1150, 1152 (Tenth Cir. 1977), *cert. denied,* 435 U. S. 1006, 98 S. Ct. 1876, 56 L. Ed. 2d 388 (1978); *see also Plains Electric Generation and Transmission Cooperative, Inc. v. Pueblo of Lagune,* 542 F. 2d 1375, 1381-1382 (Tenth Cir. 1976) (Seth, J., dissenting). Accordingly, the Court determines that § 357 and not the 1948 Act applies in the instant proceeding and therefore Movants' Motion to Dismiss should be overruled.

The Court further determines that this ruling involves a controlling question of law as to which there is substantial ground for difference of opinion that an immediate appeal from this Order may materially advance the ultimate termination of this litigation. Therefore, Movants are hereby granted permission to take an interlocutory appeal from this ruling, but the Court declines to stay proceedings in this matter pending resolution of this appeal. *See* 28 U. S. C. § 1292(b).

In view of the fact that the Court has now appointed commissioners in this case and in light of the disposition made above in connection with Movants' Motion to Dismiss, the Court determines that Movants' "Motion to Postpone Appointment of Commissioners, or in the Alternative to Prohibit Plaintiff from Entering into Possession, Pending Final Resolution of Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction" should be stricken as moot as to the requested postponement and overruled as to a prohibition from entering into possession when Plaintiff is in position to request the same.

IT IS SO ORDERED this 8th day of July, 1981.

/s/ Fred Daugherty
United States District Judge

APPENDIX D

Memorandum of Interior Solicitor

(SEAL)

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Washington, D. C. 20240

Nov. 28, 1980

Memorandum

To: Assistant Secretary, Land and Water

From: Solicitor /s/ Clyde O. Martz

Subject: Condemnation of Alaska Native Allotments for Rights-of-Way

This responds to the request of the Northwest Alaskan Pipeline Company, transmitted through you, for a legal memorandum on the following question: May Alaska Native allotments be condemned for rights-of-way?

This issue was addressed by the Associate Solicitor for Indian Affairs in an opinion dated April 28, 1967. His view was that Alaska Native allotments could be condemned under the authority of section 3 of the Act of March 3, 1901 (25 U. S. C. § 357). Section 357 provides:

> "Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."[1]

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[1]Twice the United States Supreme Court has ruled that condemnations pursuant to section 357 must be filed in federal court and that the United States is an indispensable party. *United States v. Clarke,* 445 U. S. 253 (1980); *Minnesota v. United States,* 305 U. S. 382 (1939).

I have reviewed the 1967 opinion, and I concur in its view that section 357 applies equally to Alaska Native allotments and to allotments made pursuant to the General Allotment Act (25 U. S. C. §§ 331 *et seq.*).

However, a salient issue not addressed by the 1967 opinion has recently arisen in several such condemnation actions. That issue is whether the Act of February 5, 1948 (25 U. S. C. §§ 323 *et seq.*), which provides the Secretary with the authority to grant rights-of-way for any public purpose across trust or restricted Indian lands, impliedly superseded or repealed the authority to condemn rights-of-way under section 357. The argument is that Congress, when it enacted the 1948 Act, intended to give Indians greater control over the disposition of their lands, and to that end provided in section 2 of the Act (25 U. S. C. § 324) that the Secretary could not grant rights-of-way under the Act without the consent of the affected allottees (except in specific, limited circumstances) or without the consent of tribes organized under the Indian Reorganization Act (25 U. S. C. §§ 461 *et seq.*). To give continuing authority under section 357 to condemn allotted Indian lands is said to defeat that objective. *Cf. Plains Electric Generation and Transmission Coop. v. Pueblo of Laguna,* 542 F. 2d 1375, 1380 (10th Cir. 1976). Supporters of this argument also note that the savings clause in the 1948 Act (25 U. S. C. § 326) preserves any existing authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands, but makes no reference to the general condemnation authority of section 357.

This argument was made last January before the Supreme Court in *United States v. Clarke,* 445 U. S. 253 (1980), by

counsel for the allottee in that case. The United States' brief did not address that issue; nor did the Court's opinion, (see 445 U. S. at 254, note 1). But, when asked whether the United States endorsed the position of the allottee's counsel, the representative of the Office of the Solicitor General answered in the affirmative. We understand this to be the position of the Deputy Solicitor General, though to our knowledge, the Department of Justice has not sought to dismiss any condemnation proceeding pursuant to section 357 on this ground.

It must be said that the weight of authority runs against this argument. Indeed, the U. S. Court of Appeals for the Ninth Circuit long ago ruled that the 1948 Act and section 357 are not inherently inconsistent but that they provide two independent methods of procedure to acquire a right-of-way. *Nicodemus v. Washington Water Power Co.*, 264 F. 2d 614, 618 (1959); see also *Transok Pipeline Co. v. Darks*, 565 F. 2d 1150, 1153 (10th Cir. 1977). That this remains the rule of the Ninth Circuit seems clear from the recent decision of the U. S. District Court in *Southern California Edison Co. v. 33.49 Acres of Land*, No. CV-3709-RJK (C.D. Cal.), entered September 19, 1980. We are told that the district judge has certified the issue for appeal.

The issue is also currently before federal courts in Nebraska, *Nebraska Public Power Dist. v. 100.95 Acres of Land*, Docket No. 79-0411 (D. Neb.), and in New Mexico, *Mapco v. Toledo*, Civil No. 80-507-M (D. N. M.). Thus, we may soon see whether the argument that the 1948 Act supersedes the condemnation authority of section 357 for rights-of-way gains any support in the courts. It has been the consistent practice of the Interior Department not to oppose the condemnation of rights-of-way over allotted

lands on this ground. Indeed, as early as 1923 the Department was of the view that section 357 had not been repealed or superseded by subsequent acts of Congress providing the Secretary with authority to grant rights-of-way across allotted Indian lands. 49 L. D. 396. Whether this position should be reconsidered in light of the 1948 Act will turn largely on the court proceedings in the current cases.

We have limited this memorandum to a discussion of the application of 25 U. S. C. § 357 to Alaska Native allotments because of the brief time period within which we were required to respond and because of an abundance of judicial precedent interpreting that statute.

Clyde O. Martz

cc: Deputy Assistant Secretary, Indian Affairs

No. 82-1355

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

CORNELIA DEROIN YELLOWFISH, STELLA DEROIN ROWE, WILLENE DEROIN ROSS, CLARICE DEROIN RICKMAN, WILMA DEROIN GUOLADDLE, PEARL H. DEROIN McKINNEY, LILLIAN CARSON MORGAN, LENA SHADLOW BLACK, LOUIS (LEWIS) PETERS,

Petitioners,

vs.

CITY OF STILLWATER, OKLAHOMA, AND THE UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Opposing Brief of Respondent, City of Stillwater, Oklahoma

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Stillwater, Oklahoma,
with Winfrey D. Houston on the Brief)

Counsel For Respondent, City of Stillwater, Oklahoma

March, 1983

QUESTIONS PRESENTED FOR REVIEW

1. Whether 25 U.S.C. Sect. 357 which authorizes the condemnation of Indian trust allotments has been partially displaced by 25 U.S.C. Sect. 323-328 which authorizes the Secretary of the Interior and Indian landowners to consent to right-of-ways across trust allotments.

2. Whether the United States, by taking the position in this case that 25 U.S.C. Sect. 357 is not partially displaced by 25 U.S.C. Sect. 323-328, acted outside the scope of its trust duties to the Indian allottees, and breached its trust responsibilities.

PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties.

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No. 82-1355

IN THE
SUPREME COURT OF THE UNITED STATES
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CORNELIA DEROIN YELLOWFISH, STELLA DEROIN ROWE, WILLENE DEROIN ROSS, CLARICE DEROIN RICKMAN, WILMA DEROIN GUOLADDLE, PEARL H. DEROIN McKINNEY, LILLIAN CARSON MORGAN, LENA SHADLOW BLACK, LOUIS (LEWIS) PETERS,

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vs.

CITY OF STILLWATER, OKLAHOMA, AND THE UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

OPPOSING BRIEF OF RESPONDENT, CITY OF STILLWATER TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Respondent, City of Stillwater, Oklahoma, respectfully prays that a writ of certiorari to review the opinion of the United States Court of Appeals For the Tenth Circuit entered in this proceeding on April 28, 1982, be denied.

OPINIONS BELOW

Respondent agrees with Petitioners' statement thereof.

JURISDICTION

Respondent agrees with Petitioners' statement thereof.

STATUTES INVOLVED

Respondent agrees with Petitioners' statement thereof.

STATEMENT OF THE CASE

Respondent deems it necessary to call the Court's attention to the last paragraph of the opinion complained of "APPENDIX A", App. 11-12 to Petitioners' Brief which reads:

"Even if the Government needed to demonstrate why right-of-way condemnations are in the best interest of Indians, we are persuaded that the Government adequately made such a showing in oral argument. If

condemnation is not permitted, a single allottee could prevent the grant of a right-of-way over allotted lands for necessary roads or water and power lines. Moreover, Indian allottees benefit as much from public projects as do those non-indian property owners whose land is interspersed with the allottees' land".

REASONS FOR NOT GRANTING THE WRIT

The Petitioners have not shown special and important reasons of the character described in Rule 17 of this Court to grant review on certiorari.

1. 25 U.S.C. Sect. 357 and 25 U.S.C. Sect. 323-328 are not, irreconcilable but provide alternate methods of acquiring rights-of-way across lands which have been allotted in severalty to Indians.

For all practical purposes, lands so allotted are private property with the owners having the full beneficial use thereof. Such lands have never been considered as property appropriated to a public use. Petitioners seek to have such allotted lands placed in a separate class,

untouchable for public improvements without the joint consent of the Secretary of Interior and the Indian Owner. Under this theory, highways, electrical transmission lines, pipe lines and all other public improvements could not be constructed without consent. Oklahoma is spotted with restricted lands held in trust for Indian Allottees. If Congress had intended this result, it would have made its meaning clear, United States v. Oklahoma Gas and Electric Company, 318 U.S. 206 (1943). Other authorities cited in the opinion complained of, clearly show the invalidity of the Petitioners' assertions.

2. Review is inappropriate in this case because interpretation of 25 U.S.C. Sect. 357 and 25 U.S.C. Sect. 323-328 by the Federal Courts of Appeal has resulted in decisions which are consistent and not in conflict between the several Federal Courts of Appeal.

Petitioners admit in their Petition, Pages 10-12 that with one exception Federal courts have construed such statutes as providing alternate means of acquiring right-of-ways over allotments. The one exception being Nebraska Public Power District v. 100.95 Acres, etc., 540 F.Supp. 592 (D Neb. 1982 now pending in the 8th Circuit). This Trial Court decision is in conflict with United States v. Minnesota, 113 F.2d 770 (8th Cir. 1940), and would not otherwise be grounds for review under the conflict of decision provision of Rule 17 of this Court.

Petitioners assert that the recent decision of this court, United States v. Clarke 445 U.S. 253 (1980) rested its decisions on grounds other than the continued effectiveness of 25 U.S.C. Sect. 357. However, in the opinion of Mr. Justice Rehnquist:

". . . We further believe that the word 'condemns' at least as it was commonly used in 1901, when 25 U.S.C. Sect. 357 was enacted, had reference to a judicial proceeding instituted for the purpose of acquiring title to private property and paying just compensation for it.

. . . . and since we hold that only in such a formal judicial proceeding, may land such as this be acquired, the complex, factual, and legal history of the dispute between the Government, respondents Glen M. Clarke, et al., and respondent, Bertha Mae Tabbytite, need not be recited in detail. . . . . "

The effectiveness of 25 U.S.C. Sect. 357 continues to have a history of reaffirmance.

3. The decision of the 10th Circuit in this case does not conflict in principle with its earlier decision in Plains Electric Generation and Transmission Cooperative v. Pubelo of Laguna, 542 F.2d 1375 (10th Cir. 1976). The distinction in the factual situation of these two cases from the same circuit is clear and unmistakenable. The Plains Case involved tribal lands held in communal ownership. As such, their use is of a public nature and subject to the

limited sovereignty of the Tribe. The decision of the 10th Circuit in this case written by Judge Seymour, clearly demonstrates the distinction between such lands and lands allotted in severallty to Indians and basically constitute private property.

The two decisions of the 10th Circuit does not constitute a departure from the accepted and usual course of judicial proceedings nor a sanction of such by a lower court so as to call for an exercise of this Court's power of supervision under its Rule 17.

4. The 10th Circuit did not misinterpret this Court's decision in ANDRUS v. Glover Construction Company, 446 U.S. 608 (1980).

Petitioners' theory of a partial repeal or "displacement" of Section 357, with 25 U.S.C. §§323-328, is not maintainable. The first provides for a taking by condemnation, without the consent

of the owner. The second requires consent by both the owner and the Secretary of Interior. Thus, if the consent provision is required, there could be no taking by condemnation. Under this theory, Section 357 would have to be totally invalidated. The 10th Circuit opinion was correct in rejecting the Petitioners' theory which follows this Court's opinion rather than misinterpretating it.

5. The United States did not breach its trust responsibilities.

Of the 110 Indian defendants in this case, 9 chose to attack taking in condemnation, on the theory of an implied repeal of 25 U.S.C. Sect. 357. The United States acting as Trustee, must follow the law even though 9 of the 110 defendants disagree with its interpretation. The opinion of the 10th Circuit is correct in its holding that there was no breach of

trust and the continued validity of Section 357 is in the best interest of Indians as demonstrated by the Government during oral argument.

CONCLUSION

For the reasons stated, the Court is respectfully is requested to deny a writ of certiorari.

Respectfully submitted,

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Brief

Counsel For Petitioners

March 1983

No. 82-1355

In the Supreme Court of the United States

OCTOBER TERM, 1982

CORNELIA DEROIN YELLOWFISH, ET AL., PETITIONERS

v.

CITY OF STILLWATER, OKLAHOMA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

CAROL E. DINKINS
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QUESTIONS PRESENTED

1. Whether Section 3 of the Indian Appropriations Act of 1901, 25 U.S.C. 357, authorizing condemnation of lands allotted to Indians, and the Rights-of-Way Act of 1948, 25 U.S.C. 323 *et seq.*, authorizing the Secretary of the Interior to grant rights-of-way over Indian lands under specified conditions, provide alternative means of obtaining rights-of-way over allotted Indian lands.

2. Whether the United States, by taking the position that the statutes do not provide alternative means of obtaining rights-of-way, breached its trust responsibilities to petitioners, thereby requiring that the action to condemn the rights-of-way be dismissed for lack of the "effective" presence of the United States as trustee of the allotted condemned lands.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 691 F.2d 926. The opinion and order of the district court (Pet. App. 15-19) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 28, 1982. A petition for rehearing was denied on November 12, 1982 (Pet. App. 13-14). The petition for a writ of certiorari was filed on February 10, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of Section 3 of the Indian Appropriations Act of 1901, 25 U.S.C. 357, and the Rights-of-Way Act of 1948, 25 U.S.C. 323 through 328, are set out at Pet. 2-4.

STATEMENT

1. On May 21, 1981, the City of Stillwater, a political subdivision of the State of Oklahoma, filed a petition in federal district court to condemn easements over the trust allotments of the nine Indian petitioners and other Indians in Noble County, Oklahoma, for the purpose of constructing a municipal water supply pipeline. Jurisdiction was based on Section 3 of the Indian Appropriations Act of 1901, 25 U.S.C. 357. The United States was joined as a defendant because the allotments under condemnation were initially issued pursuant to the General Allotment Act of 1887, 25 U.S.C. 331 *et seq.*, with legal title to the land retained in the United States as trustee (Pet. App. 1).

The Bureau of Indian Affairs sent letters to each of the 110 allottee defendants informing them that they could choose to be represented in this condemnation action by the United States Attorney. The nine Indian petitioners, instead, retained private counsel (Pet. App. 3). They filed answers and a motion to dismiss, disputing both the City's power to condemn the easements and the district court's jurisdiction over the condemnation proceedings. They claimed that the Rights-of-Way Act of 1948, 25 U.S.C. 323-328, repealed and superseded 25 U.S.C. 357 thereby making the acquisition of the easements unlawful unless consent by the allottees and/or the Secretary of the Interior was first obtained pursuant to the 1948 Act (Pet. App. 2-3).

2. The district court concluded that 25 U.S.C. 357 was not repealed by implication and, therefore, denied petitioners' motion to dismiss. Although the court certified its interlocutory order for appeal pursuant to 28 U.S.C. 1292(b), it declined to stay the proceedings pending resolution of the appeal. The district court denied a plea to forbid the City from entering into possession of the condemned allotments in order to construct the water pipeline (Pet. App. 18-19).

On July 10, 1981, petitioners filed a petition for permission to take an interlocutory appeal from the district court's order, and a motion for a stay pending appeal. On July 27, 1981, the court of appeals, over the opposition of the United States, granted permission to take the interlocutory appeal, but denied the stay pending appeal (Pet. App. 4; Pet. 5-6).

On August 18, 1981, petitioners filed a motion requesting the court of appeals to consider whether the United States was adequately representing its Indian beneficiaries in accordance with its trust responsibilities. On September 16, 1981, the United States submitted its response, stating that the decision to support the continuing validity of 25 U.S.C. 357 was made by the Secretary of the Interior in the best interest of the Indian beneficiaries. Attached to the response was a copy of a letter dated September 15, 1981, which was sent to each allottee defendant in the case explaining the litigating position of the United States, and again advising the allottees of their right to choose counsel other than the United States Attorney if they so desired (Pet. 6; App., *infra*, 1a-3a).

3. On April 28, 1982, the court of appeals issued its decision (Pet. App. 3) affirming the trial court's holding that federal courts have jurisdiction under 25 U.S.C. 357 to condemn rights-of-way over allotted Indian land without Secretarial or Indian consent. The court also held (Pet. App. 11) that the legal position taken by the United States in support of the condemnation power is a reasonable and permissible exercise of judgment consistent with the United States' duties as trustee for the Indians.

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or of any other court of appeals. Indeed, it resolves the first question presented precisely as the Ninth Circuit did in *Southern California Edison Co.* v.

Rice, 685 F.2d 354 (1982), cert. denied, No. 82-873 (Mar. 28, 1983). Accordingly, further review by this Court is not warranted.

1. Petitioners' principal argument (Pet. 7-17) is that rights-of-way across allotted Indian lands are now governed by the Rights-of-Way Act of 1948, 25 U.S.C. 323 *et seq.*, and that 25 U.S.C. 357, upon which the City of Stillwater relied, remains applicable only to non-right-of-way situations, such as the condemnation of an entire allotment. In our view, however, the 1948 Act and 25 U.S.C. 357 form a unified statutory scheme for acquiring rights-of-way over allotted Indian land. A state-authorized condemnor may proceed under either statute to obtain a right-of-way over allotted lands. The potential condemnor may apply to the Secretary of the Interior for a right-of-way under the 1948 Act, provided the consent of the allottees is obtained,[1] or he may proceed under 25 U.S.C. 357 to condemn the right-of-way.

In *United States* v. *Minnesota*, 113 F.2d 770, 773 (1940), the Eighth Circuit, rejecting the argument that 25 U.S.C. 357 was modified by the requirement of secretarial consent to rights-of-way under Section 4 of the Indian Appropriations Act of 1901, 25 U.S.C. 311, explained why Congress could reasonably intend that rights-of-way might be acquired by either condemnation or grant from the Secretary (113 F.2d at 773):

> The statutes seem definitely to offer two methods of procedure for the acquisition of a right of way for public highway. Section 3, 25 U.S.C.A. § 357, authorizes the maintenance of condemnation proceedings. Ordinarily, the owner of a fee title to real estate may

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[1]There are four exceptions to this consent requirement. See 25 U.S.C. 324.

> grant a right of way over his land, but although the allottee is vested with fee title, his right of alienation is restricted, and hence, it would not be possible to secure a right of way from such allottee by purchase, however desirable it might be, and however advantageous to the allottee. By Section 4 of the Act, 25 U.S.C. A. § 311, the Secretary of the Interior is authorized to grant permission for the opening and establishment of a public highway through lands allotted in severalty. Thus, it was made possible to acquire such a right of way by either of two methods, * * * neither dependent upon the other.

Accordingly, petitioners misapprehend the relationship between 25 U.S.C. 357 and the 1948 Act in arguing (Pet. 7) that the protective provisions of the 1948 Act will be nullified if rights-of-way may be obtained by condemnation. The powers of the Secretary and the allottee under the 1948 Act arise only when the entity acquiring the right-of-way attempts to obtain the right-of-way by purchase, not when it elects to condemn the interest. Compare the 1948 Act, 25 U.S.C. 323 *et seq.*, with 25 U.S.C. 357.[2]

Petitioners also err in suggesting (Pet. 12) that the question of the relationship between the two statutes is a "long-standing troublesome issue of statutory construction." In addition to the Eighth Circuit decision in *United States* v. *Minnesota, supra*, holding that condemnation is an alternative method for acquiring rights-of-way across allotted Indian land, the other courts of appeals addressing the question have uniformly held, as the Tenth Circuit did here,[3] that 25 U.S.C. 357 and the 1948 Act provide

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[2]As the court of appeals properly recognized (Pet. App. 11), other—judicial—safeguards are afforded when the right-of-way is acquired through condemnation.

[3]The court of appeals properly noted (Pet. App. 9-10) that 25 U.S.C. 357 is still in force. The court found it persuasive that in 1976 Congress

alternative, independent methods of obtaining easements across allotted land. *Southern California Edison Co.* v. *Rice, supra*, 685 F.2d at 357; *Transok Pipeline Co.* v. *Darks*, 565 F.2d 1150, 1153 (10th Cir. 1977), cert. denied, 435 U.S. 1006 (1978); *Nicodemus* v. *Washington Water Power Co.*, 264 F.2d 614, 617-618 (9th Cir. 1959). The single contrary decision by the district court in Nebraska (Pet. 10), presently on appeal to the Eighth Circuit and presumptively subject to reversal in light of that court's ruling in *United States* v. *Minnesota, supra*, does not undermine the force of the consistent determinations of three courts of appeals. Although this Court has never decided the issue, that does not of course require an exercise of certiorari jurisdiction in the absence of a conflict among the courts of appeals.

Petitioners stress (Pet. 8-10) that Congress' establishment of a new policy for Indian lands in the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. 461 *et seq.*, and the 1948 Act, repudiated the allotment policies upon which 25 U.S.C. 357 was predicated. On this basis, they argue that, consistent with the new policy of affording Indians greater control over their lands, the 1948 Act should be construed as displacing 25 U.S.C. 357, with respect to acquisition of rights-of-way.

The fact remains, however, that prior to 1934 thousands of allotments had been approved and the IRA did not eviscerate these allotments. Furthermore, it is anomalous to argue, as petitioners do, that allottees must invariably have the power to prohibit rights-of-way across their allotments, as a means of controlling their destinies, while at the same time effectively conceding that the entire fee interest in

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extended operation of 25 U.S.C. 357, and reemphasized the applicability of the 1948 Act to the Pueblo Indians of New Mexico. See Act of Sept. 17, 1976, Pub. L. No. 94-416, Section 3, 90 Stat. 1275. Accord: *Southern California Edison Co.* v. *Rice, supra*, 685 F.2d at 356.

every allotment may be condemned without the consent of the allottees. 25 U.S.C. 357 was, and still is, a necessary tool for accommodating the requirements of state and local governments to the remaining allotments (Pet. App. 10). As this Court in 1943, well into the new era, explained:

> Oklahoma is spotted with restricted lands held in trust for Indian allottees. Complications and confusion would follow from applying to highways crossing or abutting such lands rules differing from those which obtain as to lands of non-Indians. We believe that if Congress has intended this it would have made its meaning clear.

United States v. *Oklahoma Gas & Electric Co.*, 318 U.S. 206, 211 (1943). Although in *Oklahoma Gas* this Court was describing why a restrictive interpretation of Section 4 of the Indian Appropriations Act of 1901, 25 U.S.C. 311, was not required to protect the Indians, the reasoning applies equally to 25 U.S.C. 357. See Pet. App. 10.

Petitioners' further contention (Pet. 13-14), that the Tenth Circuit's decision in this case conflicts with its earlier decision in *Plains Electric Generation & Transmission Cooperative, Inc.* v. *Pueblo of Laguna*, 542 F.2d 1375 (1976), is similarly flawed.[4] In *Plains Electric* the court held that the Act of May 10, 1926, ch. 282, 44 Stat. 498, no longer authorized condemnation of rights-of-way over *tribal* lands of the Pueblo at Laguna because the Act had been repealed by the Act of Apr. 21, 1928, ch. 400, Section 1, 45 Stat. 442, now codified at 25 U.S.C. 322, and the 1948 Act. *Plains Electric, supra*, 542 F.2d at 1381. As the court of appeals in

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[4]Even if there were merit to this claim, an intracircuit conflict is for the court of appeals, not this Court, to resolve. Cf. *Davis* v. *United States*, 417 U.S. 333, 340 (1974); *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

this case properly noted (Pet. App. 6-7), however, *Plains Electric* is distinguishable because "Section 357 authorizes condemnation of *allotted* land, while the 1926 Act allowed condemnation of lands *communally owned* by the Pueblo Indians" and, accordingly, *Plains Electric* "is silent on the subject of allotted lands." [5] This Court recognized in *United States* v. *Oklahoma Gas & Electric Co., supra*, 318 U.S. at 214, that Congress has drawn "a clear distinction between reservations and allotted lands." [6]

2. There is no merit in petitioners' further argument (Pet. 18-22) that the position taken by the United States in this litigation—that rights-of-way across Indian allotments may be condemned pursuant to 25 U.S.C. 357—is not authorized by that provision and constitutes a breach of the trust duties imposed on the United States by the General Allotment Act of 1887, 25 U.S.C. 331 *et seq.* and the 1948 Act.

Whatever the nature of the United States' fiduciary obligations under the General Allotment Act of 1887 and the 1948 Act, this Court's decision in *United States* v. *Mason*, 412 U.S. 391 (1973), makes plain that where, as here, the litigating position of the United States, as trustee, is based on directly relevant judicial decisions there is no breach of

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[5]The court below also correctly recognized (Pet. App. 6 n.5) that the *Plains Electric* court found persuasive legislative history of the 1928 Act reflecting congressional intent to completely substitute that Act for the 1926 Act. See *Plains Electric, supra*, 542 F.2d at 1377-1379. In contrast, petitioners here have cited nothing in the legislative history of the 1948 Act to indicate congressional intent to repeal or modify 25 U.S.C. 357.

[6]See also, *e.g.*, 318 U.S. at 211-215; *United States* v. *10.69 Acres of Land in Yakima County*, 425 F.2d 317, 319-320 (9th Cir. 1970); *United States* v. *Minnesota, supra*, 113 F.2d at 773.

The Ninth Circuit in *Southern California Edison Co.* v. *Rice* also found *Plains Electric* inapposite on the ground that it involved communally owned, rather than allotted, land. 685 F.2d at 357.

trust duties. In *Mason*, administrators of an estate including allotted trust property argued that the United States breached its fiduciary duties in failing to challenge assessment of state taxes against the estate, notwithstanding a decision of this Court directly supporting the United States' position. 412 U.S. at 392. The Court first noted that in such cases the trustee has a "broad discretion" whether to litigate or pay the taxes, so long as the decision is "not wholly unreasonable." *Id.* at 398-399. In view of the controlling precedent, however, the Court then went on to reject the administrators' claims more forcefully:

> [W]e therefore deal here with an assertion of taxing authority which was not merely plausible but had been expressly approved by a decision of this Court. Generally, when a trustee is in doubt as to what course to pursue, the proper procedure for him to follow is to conform his conduct to the instructions given him by the courts. * * *
>
> [I]f the doctrine of *stare decisis* has any meaning at all, it requires that people in their everyday affairs be able to rely on our decisions and not be needlessly penalized for such reliance.

412 U.S. at 399-400. Under *Mason*, the United States was clearly entitled in this case to rely on the unanimous determination of all courts of appeals addressing the issue that condemnation pursuant to 25 U.S.C. 357 is an alternative means of acquiring rights-of-way across allotted Indian land.[7] It follows that the United States, in supporting this determination, acted with the requisite care and prudence and did not breach its trust responsibilities.

---

[7]Petitioners' contention (Pet. 21-22) that, at least in the Tenth Circuit, the question was "unsettled" is plainly wrong. Whatever inferences contrary to the position of the United States might have been drawn from the Tenth Circuit's 1976 decision in *Plains Electric*, *supra*, which

Petitioners' contention that the General Allotment Act of 1887 and the 1948 Act create duties that the United States, as trustee, breached is untenable. Even if the interest of the United States in preventing "improvident alienation" of allotted lands, *United States* v. *Oklahoma Gas & Electric Co., supra*, 318 U.S. at 213, could have been said to posit a duty to prevent state-authorized condemnation of allotments when the General Allotment Act was enacted in 1887, that duty was clearly modified by the subsequent enactment of 25 U.S.C. 357 which explicitly authorizes condemnation of allotments.[8] As for petitioners' suggestion that the

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dealt with condemnation of tribal, rather than allotted lands, and with the Act of May 10, 1926, ch. 282, 44 Stat. 498, rather than 25 U.S.C. 357, such inferences were necessarily dispelled by the court's 1977 decision in *Transok Pipeline Co.* v. *Darks, supra*, 565 F.2d at 1153, which is squarely on point.

[8]Notwithstanding petitioners' suggestion (Pet. 19), *Minnesota* v. *United States*, 305 U.S. 382 (1939), does not indicate that the United States has a duty to prevent condemnation of allotments. To the contrary, the case suggests that the interest of the United States is "implicated only to the extent of assuring a fair payment for the property taken and a responsible disposition of the proceeds." *Southern California Edison Co.* v. *Rice, supra*, 685 F.2d at 356; see *Minnesota* v. *United States, supra*, 305 U.S. at 388. Furthermore, the very existence of 25 U.S.C. 357 indicates that there is a federal interest in permitting state-authorized condemnation of allotted lands. Consistent with this determination, the Secretary of the Interior properly explained, and the court of appeals noted (Pet. App. 12), that, if condemnation were not permitted, a single allottee could prevent acquisition of rights-of-way needed for roads or water and power lines, improvements that benefit Indian allottees as much as they benefit others.

Contrary to petitioners' allegations (Pet. 20), *United States* v. *Sioux Nation*, 448 U.S. 371 (1980), does not suggest that there is invariably an "antagonism between the power to condemn and the duties of a trustee." Rather, in *Sioux Nation* this Court approved the statement by the Court of Claims that " 'where Congress makes a good faith effort to give the Indians the full value of the land and thus merely transmutes the property from land to money, * * * [t]his is a mere substitution of

United States is required to impose protective conditions on acquisition of rights-of-way, as we have already discussed, such duties would arise only when the acquiring entity attempts to secure a right-of-way by grant from the Secretary under the 1948 Act, not when it elects to condemn the right-of-way under 25 U.S.C. 357. Accordingly, the United States has breached no duties imposed by these statutes.

At all events, even if one assumes, *arguendo*, that the United States breached its fiduciary duties by not arguing that 25 U.S.C. 357 has been repealed by implication, it is difficult to see how petitioners in this case have been harmed by the government's stance. Indian allottees have the capacity to sue and defend actions on their own behalf; when dissatisfied with the government's representation of their interests, they may choose other counsel. See *United States* v. *Mason, supra*, 412 U.S. at 399; *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 368-371 (1968). Petitioners here were advised of this right (App., *infra*, 1a-3a) and took advantage of it (Pet. App. 3). Counsel of their own choosing, throughout this litigation, made the argument that 25 U.S.C. 357 has been partially repealed. Accordingly, by their own standards, petitioners were adequately represented.

---

assets or change of form and is a traditional function of a trustee.' " 448 U.S. at 409; see *id.* at 416. By enacting 25 U.S.C. 357, Congress clearly made the requisite "good faith effort." It did not simply authorize the taking of allotted lands; rather, it specified that "money awarded as damages shall be paid to the allottee." 25 U.S.C. 357.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1983

DOJ-1983-04

APPENDIX

U.S. Department of Justice

Washington, D.C. 20530

September 15, 1981

NAME

ADDRESS

Dear :

As you should know from earlier letters from the Bureau of Indian Affairs, a right of way is being condemned over part of your land by the City of Stillwater, Oklahoma to lay waterpipes from Kaw Reservoir to Stillwater. The name and number of this condemnation case in the United States District Court for the Western District of Oklahoma is *City of Stillwater, Oklahoma* v. *An Easement and Right-of-Way for Water Pipeline Purposes Across Various Tracts of Land in Noble County, Oklahoma, as Indicated, et al.*, NO. CIV. 81-674-D.

You are one of the allottees named as a defendant in this case. The Bureau of Indian Affairs has sent you a letter telling you that you could choose to have the United States Attorney represent you as your lawyer in the condemnation trial. Some of you have sent back the letter checking the appropriate box to show that you did want the United States Attorney to represent you at this trial.

This trial determines how much money Stillwater has to pay all the landowners for the right of way. You do not have to have a lawyer to represent you at this trial. You will still

get paid for the right of way that crosses your land even if you do not have a lawyer present at the trial.

Nine of the Indian allottees, whose land is being condemned for this right of way, have chosen to be represented by lawyers from the Native American Rights Fund. The Native American Rights Fund is located at 1506 Broadway, Boulder, Colorado 80302; telephone: (303) 447-8760. These lawyers are arguing that the court does not have the power to order the condemnation of allotted land. If these lawyers win this argument for the nine allottees, then Stillwater will not be able to put its waterpipe under your land without your consent. Even if you consent, Stillwater will still have to pay you for the right of way over your land.

The United States Attorney, representing the Indian allottees who have chosen him and the Secretary of the Interior, is going to argue that the court DOES have the power to order the condemnation of the right of way over your land. If the position argued by the United States Attorney prevails, then Stillwater will be able to put its waterpipe under your land, but Stillwater will have to pay you for taking this right of way.

If you do not want the United States Attorney to represent you in this case, then you are free to get another lawyer, either a lawyer from the Native American Rights Fund, or any other lawyer you choose. You are not required to have a lawyer at all. If Raymond Sanford, Regional Solicitor, Department of the Interior, P.O. Box 3156, Tulsa, Oklahoma 74101, does not hear from you within ten days from

the date of this letter, it will be presumed that you are satisfied to have the United States Attorney represent you in this case.

Sincerely,

s/s Laura Frossard

Laura Frossard
Dirk D. Snel
Attorneys, Department of Justice
Washington, D.C. 20530

No. 82-1355

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CORNELIA DEROIN YELLOWFISH, ET AL.,

Petitioners,

vs.

CITY OF STILLWATER, OKLAHOMA, AND THE UNITED STATES OF AMERICA,

Respondents.

PETITIONERS' REPLY BRIEF

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May, 1983

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PETITIONERS' REPLY BRIEF

ARGUMENT

1. The United States argues that this Court's decision in United States v. Oklahoma Gas & Electric Co., 318 U.S. 206 (1943) supports the proposition that current congressional policy approves state control over trust allotments, and that the application of 25 U.S.C. § 357 to trust allotments is thus consistent with that policy. See Brief For The

United States in Opposition 6-7. The United States relies in particular upon the finding in Oklahoma Gas & Electric that Congress intended to distinguish between trust allotments within and those without existing reservations, by making allotments outside reservations subject to state law. Even though such may have been the reasonable view of federal policy in 1943, that policy had changed beginning with the passage of the Indian Reorganization Act of 1934, 25 U.S.C. § 461 et seq., although the change was, in 1943, not yet generally reflected in federal statutes. See, Petition for Certiorari 13-14.

Then in 1948 Congress passed legislation confirming its new policy that trust allotments should be subject to exclusive federal and tribal jurisdiction. 18 U.S.C. § 1151(c) established that allotted lands, like reservation lands,

are "Indian country," subject to federal and tribal jurisdiction, and 25 U.S.C. §§ 323-328 empowered the Secretary to grant, and the Indians to consent to, right-of-ways over trust allotments whether within or outside reservations.

The legislative history of 25 U.S.C. §§ 323-328 shows that one of its specific purposes was to eliminate any distinctions between allotted lands within reservations and those outside, insofar as right-of-way acquisition was concerned. See, e.g., S.Rep. No. 832, 80th Cong. 2d Sess., 1948 U.S. Code Cong. and Ad. News 1033. Significantly, the example cited in the Senate Report as illustrative of the "artificial distinctions" intended to be eliminated by 25 U.S.C. §§ 323-328 was the direct result of the decision in Oklahoma Gas & Electric, supra. As discussed in the Senate Report:

> For example, the acts of February 15, 1901 (31 Stat. 790), and March 4, 1911 (36 Stat. 1253), which authorizes the granting of transmission line rights-of-way, are limited in their application to "reservations of the United States," which have been held to include only those individual Indian allotments within the original boundaries of Indian reservations which were not extinguished by cession to the United States. These acts are also inapplicable to individual Indian allotments on the public domain. There would seem to be no persuasive reason for maintaining such artificial distinctions.

See, S.Rep. No. 823, supra at 1036, (emphasis added).

Clearly, the congressional policy evinced in 1943, the date Oklahoma Gas & Electric, supra, was decided, was not the policy evinced in 1948. Thus, Oklahoma Gas & Electric provides no support for the argument that the application of section 357 to right-of-ways across trust allotments is consistent with current

congressional policy.

Moreover, this same erroneous view of current congressional policy toward the jurisdictional status of trust allotments fatally undermines the decision of the Tenth Circuit in Plains Electric Generation & Transmission Cooperative v. Pueblo of Laguna, 542 F.2d 1375 (10th Cir. 1976), and that of the Ninth Circuit in Nicodemus v. Washington Water Power Co., 264 F.2d 614 (9th Cir. 1959). 1/ Both Courts relied heavily upon the afore-discussed erroneous view that current congressional policy favors subjecting trust allotments to state jurisdiction.

Furthermore the decision of the Eighth Circuit in United States v.

1/ In its most recent decision, Southern California Edison Co. v. Rice, 685 F.2d 354, cert. denied, 51 U.S.L.W. 3703 (U.S. Mar. 28, 1983) (No. 82-873), the Ninth Circuit simply relied on its decision in Nicodemus.

Minnesota, 113 F.2d 770 (8th Cir. 1940) was rendered before the aforementioned 1948 congressional legislation affecting allotted lands, and thus that Court had no occasion to consider the status of congressional policy toward allotments in the considerable light cast by that legislation.

2. As more fully discussed in (a), contrary to the United States' contention, the standard of reasonableness applied in United States v. Mason, 412 U.S. 391 (1973) is not properly applicable to judge the propriety of the United States' continuing conduct in this case because that standard assumes that circumstances could exist under which the conduct could be upheld as reasonable. The particular conduct of the United States in this case is inherently and irreconcilably in conflict with its trust duty to prevent the

alienation of trust property and, therefore, the Mason standard is inapplicable.

However, as more fully discussed in (b), even if the standard of reasonableness set out in United States v. Mason is applied, it compels the conclusion that the United States' decision was plainly unreasonable.

(a) It is a fundamental principle of trust law that

> [a] trustee commits a breach of trust if he violates any duty which he owes as trustee to the beneficiaries.

III A. Scott, The Law of Trusts § 201 at 1650 (3d ed 1967) (hereinafter Scott). The United States committed a breach of trust in this case when it took a litigating position supporting the claim of the respondent City that it has authority to condemn the trust allotments of petitioners for a right-of-way.

Such a position is inherently and irreconcilably in conflict with the trust duty imposed by Congress on the Secretary of the Interior under the General Allotment Act of 1887, as amended, 25 U.S.C. §§ 331 et seq. "to prevent alienation of the [allotted] land. ..." United States v. Mitchell, 445 U.S. 535, 544 (1980), accord, II Scott, "Duty to Preserve the Trust Property," § 176 at 1419.

Moreover, the United States' litigating position is beyond its powers as the Indians' trustee. Under general trust principles, a trustee has no power to violate a duty to the beneficiary. As Professor Scott states in the prelude to the trust powers section of his treatise: "When it is said that the trustee has the power to do an act ..., we mean that he has the power to do it without violating a duty to the beneficiary."

III Scott § 185A at 1496. Accordingly, since a litigating position supporting the respondent City's claim of power to condemn trust allotments for right-of-ways is inherently antagonistic to the United States' duty to prevent alienation of trust allotments, the United States has no power as the Indians' trustee to take such a position. Cf. United States v. Sioux Nation of Indians, 448 U.S. 371 (1980) (federal condemnation power over Indian lands is the antithesis of the federal trust power). The United States, therefore, failed to represent the petitioners as their trustee as required by Minnesota v. United States, 305 U.S. 382 (1939), and this action, therefore, lacked an indispensible party. Id. See also, Petition for Certiorari 18-22.

However, the United States in its Brief in Opposition argues that the

propriety of its litigating position should be tested under the standard set forth in United States v. Mason, supra, and that, under the Mason standard, the United States' position should be upheld as proper.

The standard applied in United States v. Mason to judge the propriety of the litigating decision made by the United States as the Indians' trustee is the traditional trust standard. Under traditional principles of trust, a trustee has a duty to enforce claims for the purpose of preserving the trust property, II Scott § 177 at 1424, and likewise a duty to defend actions which seek to diminish the trust property, II Scott § 178 at 1428, when it is reasonable to do so under the circumstances, II Scott §§ 177, 178, supra, § 174 at 1408 (duty to exercise reasonable care and

skill), III Scott § 187.2 at 1513 (reasonableness of trustee's exercise of judgment).

This Court in Mason applied the traditional trust standard and held that the United States acted reasonably in not bringing suit to challenge the applicability of an estate tax to trust allotments because the tax had previously been upheld by the Supreme Court in a case which subsequently had been neither overruled nor questioned. See Mason, supra at 400.

The problem with the application of the Mason standard to judge the United States' litigating position is that the standard assumes the possibility that circumstances could exist under which that position could be found to be reasonable. Obviously, the standard is inappropriate when the power exercised

is inherently and irreconcilably in conflict with a trust duty. Such conduct is per se a breach of trust.

However, while the United States has no power to take a litigating position in support of the respondent City's power to condemn, as we discussed earlier, under general trust principles, the United States, as the Indians' trustee, has the power to defend or not to defend suits seeking to diminish the trust estate.

Therefore, the Mason standard is applicable only if the litigating position of the United States is within its trust powers. Then the standard applies to judge the reasonableness of the exercise of the power. Insofar as the United States' litigating position implies that the United States also decided at some point not to raise the defense that section 357 is not applicable to right-

of-ways, then the Mason standard applies to judge the propriety of that decision.

(b) Assuming arguendo that the litigation decision of United States in this case may also be considered as a decision not to raise a defense, application of the Mason standard compels the conclusion that the United States breached its trust in not raising the jurisdictional defense that section 357 does not authorize condemnation of right-of-ways over trust allotments.

Essentially, Mason established that the standard of reasonableness by which to judge litigation decisions of the United States acting as trustee is to be found in an analysis of controlling judicial precedent. In Mason, the decision of the United States not to sue was upheld because it relied on a controlling Supreme Court case. In this

case there is no controlling Supreme Court case. 2/

This case arose within the jurisdiction of the Court of Appeals for the Tenth Circuit. Under Mason, since there was no controlling Supreme Court decision, the question becomes whether the United States' failure to raise the defense in question was reasonable in light of the law of the Tenth Circuit. We contend that a reasonable trustee, in light of the Tenth Circuit law, the law of other circuits, and an analysis of congressional policy from the viewpoint of a trustee that it was reasonable to raise the defense in question in section 357

2/ Indeed, this Court has expressly declined to reach the issue with respect to Section 357 in previous cases choosing instead to rest the decision on other grounds. See, Minnesota v. United States, 305 U.S. 382, 391 (1939); and United States v. Clarke, 445 U.S. 253, 254 n.1 (1980), and see also Petition for a Writ of Certiorari at 11-12.

proceedings within the jurisdiction of the Tenth Circuit.

The Tenth Circuit had never ruled on the issue raised in this case. The reasoning of the Tenth Circuit in Plains Electric Generation & Transmission Cooperative v. Pueblo of Laguna, 542 F.2d 1375 (10th Cir. 1976) argueably controlled the jurisdictional issue in this case, and compelled a decision that section 357 does not apply to right-of-ways. See Petition for Certiorari 13-14.

The United States, however, argues that the case of Transok Pipeline Co. v. Darks, 565 F.2d 1150 (10th Cir. 1977), cert. denied, 435 U.S. 1006 (1978) dispelled any inference that the question of the relationship between section 357 and sections 323-328 was not settled in the Tenth Circuit. See Brief for the United States in Opposition at 6 and 9

n.7. On the contrary, the reasonable construction of that case reconciles it with the analytical approach taken by the Tenth Circuit in Plains Electric.

Transok involved the question of whether an underground gas storage "easement" could be condemned under section 357, without the Secretary's consent. The Court examined a number of statutes including sections 323-328 and found that none required the consent of the Secretary to condemnation of a gas storage "easement". The Court did not specify the grounds for its finding but two inferences are possible.

On the one hand it might be inferred that section 357 was found to be an alternative to sections 323-328. This is respondents' argument. But it may also be inferred that the Court found that a gas storage "easement" is not a

right-of-way subject to 25 U.S.C. §§ 323-328 or covered by any other special statute, and hence, section 357 applies. This is petitioners' argument. Under petitioners' argument, Transok is plainly harmonious with the reasoning and decision in Plains Electric. In contrast, respondents' argument necessarily assumes that the Tenth Circuit made an erroneous finding, i.e., that sections 323-328 apply to an underground gas storage "easement". For this reason, respondents' view of the ground for the Transok decision is unreasonable.

Furthermore, at the time of the appeal of this case to the Tenth Circuit, there was only one other circuit court case precisely in point, i.e., Nicodemus v. Washington Water Power Co., 264 F.2d 614 (9th Cir. 1959) (upholding condemnation of right-of-ways under section

357 notwithstanding 25 U.S.C. §§ 323-328). And there was another circuit court case closely related, i.e., United States v. Minnesota, 113 F.2d 770 (8th Cir. 1940) (upholding condemnation of a highway right-of-way under section 357 notwithstanding 25 U.S.C. § 311). Neither of these cases is, of course, controlling in the Tenth Circuit, and sound arguments can be made as to why the reasoning and conclusions of those cases should be rejected. See, supra at 1-6.

And finally, the United States itself has on past occasions raised, approved, or othewise acknowledged the reasonableness of the defense that section 357 does not apply to right-of-ways covered by special statutes empowering the Secretary to grant right-of-ways. These occasions are discussed in the Petition for Certiorari 11-12.

CONCLUSION

We respectfully request this Court to grant the petition for a writ of certiorari.

May, 1983 Respectfully submitted,

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(303) 447-8760

No. 82-1355

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CORNELIA DEROIN YELLOWFISH, STELLA DEROIN ROWE, WILLENE DEROIN ROSS, CLARICE DEROIN RICKMAN, WILMA DEROIN GUOLADDLE, PEARL H. DEROIN McKINNEY, LILLIAN CARSON MORGAN, LENA SHADLOW BLACK, LOUIS (LEWIS) PETERS,

Petitioners,

v.

CITY OF STILLWATER, OKLAHOMA, AND THE UNITED STATES OF AMERICA

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

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OCTOBER TERM, 1982

No. 82-1355

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BRIEF AMICUS CURIAE OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS IN SUPPORT OF RESPONDENT, CITY OF STILLWATER, OKLAHOMA

INTEREST OF THE AMICUS CURIAE

This brief *amicus curiae* is filed pursuant to Rule 36 of the Supreme Court Rules on behalf of the more than 1600 local governments, or political subdivisions of states, that are members of the National Institute of Municipal Law Officers [NIMLO]. These member local governments operate NIMLO through their chief legal officers, variously called city or county attorney, corporation counsel, city

solicitor, or law director, and other titles, with each member local government having one vote on all actions which are cast by the organization. This brief *amicus curiae* is signed by members of the Executive Committee of NIMLO, as the authorized law officers of their own local governments, and in their capacities as representatives of the NIMLO member municipalities. The City of Stillwater, Oklahoma is a member of NIMLO.

The municipal attorneys who operate NIMLO for their local governments are responsible for advising their governments' departments and agencies about the legal aspects of acquiring rights-of-way for various municipal public works projects. A reversal of the decision below will have greatly adverse consequences for those NIMLO member municipalities which have allotted Indian lands within their jurisdictions.[1] Should Petitioners prevail, states, cities, counties, towns, townships, school districts, public utilities, and all other public entities possessing the power of eminent domain would be barred from exercising such powers across allotted Indian lands.

As a result, necessary public improvements, as beneficial to Indian allottees as to other citizens, would not be made. Roads, electric power lines, gas pipelines, water pipelines, sewer systems, and a host of other public projects will not be built, even though the governmental

[1]As of 1980, the following States contained Indian Trust allotted property within their borders: Alabama, Arizona, California, Colorado, Idaho, Kansas, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, Wisconsin, Wyoming. The total area involved is in excess of 10 million acres. Source, *Statistical Abstract of the United States 1981,* 102d Edition, United States Department of Commerce, Bureau of the Census, at 228. There are literally "thousands upon thousands" of scattered Indian allotments. *Poafpybitty v. Skelly Oil,* 390 U.S. 365, 374 (1968).

entities responsible for constructing such improvements had deemed them beneficial, necessary and proper. The consequences would be disastrous for future public improvements in those jurisdictions containing allotted Indian lands.

Should Petitioners prevail, "a single allottee could prevent the grant of a right of way over allotted Indian lands for necessary roads or water and power lines." *Yellowfish v. City of Stillwater,* 691 F.2d 926, 931 (10th Cir. 1982). Such a result would stifle economic growth and development, and is contrary to congressional intent. The National Institute of Municipal Law Officers, as *amicus curiae* in support of Respondent City of Stillwater, Oklahoma, respectfully urges that the Court deny the Petition for a Writ of Certiorari in this case.

Consent to the filing of this brief has been granted by counsel for all parties. Copies of these letters of consent have been lodged with the Clerk of this Court.

SUMMARY

The court below properly ruled that Respondent possessed the power to condemn rights-of-way across Indian trust allotments in order to construct a water pipeline. 25 U.S.C. § 357 [§ 357], which authorizes such condemnation, was not repealed by 25 U.S.C. §§ 323-328 [§ 328]. There is no express repeal, and Petitioners failed to meet the heavy burden needed to demonstrate an implied repeal. *Morton v. Mancari,* 417 U.S. 535 (1974); *Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit,* 393 U.S. 186 (1968). Where, as here, the statute has been in effect for decades, repeal by implication is particularly disfavored. *Mancari,* 417

U.S. at 549. As recently as 1980, this Court has recognized the continued vitality of the condemnation provisions contained in 25 U.S.C. § 357. *United States v. Clarke,* 445 U.S. 253 (1980).

In this case, the Tenth Circuit Court of Appeals, in accordance with *Andrus v. Glover Construction,* 446 U.S. 608, 618-619 (1980), correctly viewed both § 357 and § 328 as effective, each providing an alternate means for an authorized condemnor to obtain a right-of-way over allotted lands for public improvements.[2]

The court of appeals properly applied the decisions of this Court in rejecting Petitioners' claims of a repeal by implication. The courts of appeals that have decided this issue are all in accord with the decision below. The Petition for a Writ of Certiorari should be denied.

ARGUMENT

PETITIONERS HAVE FAILED TO DEMONSTRATE SPECIAL AND IMPORTANT REASONS FOR THE GRANTING OF THE WRIT.

A. There Is No Conflict Among The Federal Courts Of Appeals.

The decision below is in accord with the decisions of all other courts of appeals which have decided this issue. *Southern California Edison v. Rice,* 685 F.2d 354 (9th Cir. 1982), *cert. denied,* 51 U.S.L.W. 3701 (U.S. March 29, 1983) (No. 82-873); *Transok Pipeline v. Darks,* 565 F.2d 1150 (10th Cir. 1977), *cert. denied,* 435 U.S. 1006 (1978);

[2]". . . [I]t is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each [statute] as effective." *Glover Construction,* 446 U.S. at 618-619, quoting *Mancari,* 417 U.S. at 551.

Nicodemus v. Washington Water Power, 264 F.2d 614 (9th Cir. 1959); *United States v. Minnesota,* 113 F.2d 770 (8th Cir. 1940).[3]

Petitioners admit that they can point to no conflicts among the circuits regarding this issue. (Petitioners' Brief pp. 10-12).

B. The Proper Rules Of Statutory Construction Were Applied.

The decision of the Tenth Circuit in this case was in accord with the rules of statutory construction established by this Court.

Rather than finding a repeal by implication, which is disfavored, *Morton v. Mancari,* 417 U.S. 535, 549 (1974), the court reconciled the two statutes so that each was given effect. *Andrus v. Glover Construction Co.,* 446 U.S. 608, 618-619 (1980). If Congress had intended to eliminate condemnation of allotted Indian land, it could have clearly and expressly made its intentions known. *United States v. Oklahoma Gas & Electric,* 318 U.S. 206, 211 (1943).

C. The Rights Of Indian Allottees Are Protected.

A condemnation proceeding instituted under § 357 protects the rights of Indian allottees. Generally, condemnation can occur only after the institution of a judicial proceeding by a public authority, where just compensation must be paid for the acquired property. The burden rests

[3]Holding that condemnation under § 357 is not modified by the requirement of secretarial consent for rights-of-way under 25 U.S.C. § 311, both provisions applying to allotted lands.

with the condemning authority to prove the need for, and value of, the condemnation. *United States v. Clarke,* 445 U.S. 253, 257-258 (1980). The Indian allottees are not at the mercy of potentially capricious public authorities. A judicial proceeding, with allottees represented by the United States Attorney, insures the propriety of condemnation proceedings brought under 25 U.S.C. § 357.

CONCLUSION

For the foregoing reasons, the National Institute of Municipal Law Officers, as *amicus curiae,* respectfully urges that the Petition for a Writ of Certiorari to the Tenth Circuit Court of Appeals be denied.

Respectfully submitted,

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